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Sup. Ct.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1942

No. 1

R. SIMPSON & CO., INC., PETITIONER,

vs.

COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 25, 1942.

CERTIORARI GRANTED JUNE 7, 1943.

INDEX

Docket Entries.

R. Simpson & Co., Inc., *Petitioner,* v. Commissioner of Internal Revenue, *Respondent.*	Docket No. 98208

Appearances:

For Taxpayer: Francis F. Stevens, Esq., Gerald Donovan, Esq.
For Comm'r: Conway Kitchen, Esq.

1939

Apr. 26 — Petition received and filed. Taxpayer notified. (Fee paid.)
Apr. 26 — Copy of petition served on General Counsel.
Apr. 26 — Request for circuit hearing in New York City filed by taxpayer. 4/26/39 copy served.

June 1 — Answer filed by General Counsel.
June 10 — Copy of answer served on taxpayer, New York Calendar.

1940

May 20 — Hearing set June 24, 1940 in New York, N. Y.

June 18 — Motion for postponement of hearing until the middle of September, 1940 filed by taxpayer. 6/21/40 granted to Fall New York Calendar.

Oct. 2 — Hearing set Nov. 18, 1940 in New York City.

Nov. 9 — Motion for continuance to Dec. 9, 1940, New York City, filed by taxpayer. (Affidavit attached.) 11/18/40 granted. 11/12/40 copy served.

Docket Entries

Nov. 9 — Motion of motion served on General Counsel.
Nov. 15 — Notice of appearance of Francis F. Stevens as counsel for taxpayer filed.
Nov. 23 — Notice of appearance of Gerald Donovan as counsel for taxpayer filed.
Nov. 18 — Hearing had before Mr. Leech on motion of petitioner to continue to the New York City Calendar of 12/9/40, showing good cause, granted.
Nov. 29 — Hearing set Dec. 9, 1940 in New York City.
Dec. 9-10-13 Hearing had before Mr. Opper on merits. Submitted. Briefs due 1/25/41; Replies 2/10/41.
Dec. 19 — Transcript of hearing 12/9 & 10/40 filed.
Dec. 26 — Transcript of hearing 12/13/40 filed.

1941

Jan. 24 — Brief filed by General Counsel.
Jan. 25 — Brief filed by taxpayer. 1/27/41 copy served on General Counsel.
Feb. 10 — Reply brief filed by taxpayer.
May 14 — Findings of fact and opinion rendered, Opper, Div. 14. Decision will be entered for the respondent. Copy served 5/17/41.
May 20 — Decision entered, Opper, Div. 14.
Aug. 18 — Stipulation of venue filed.
Aug. 18 — Petition for review by United States Circuit Court of Appeals, Second Circuit, with assignments of error filed by taxpayer.
Aug. 22 — Proof of service filed.
Oct. 15 — Praecipe for record filed by taxpayer, with proof of service thereon.
Oct. 17 — Order enlarging time to Nov. 8, 1941 to transmit and deliver the record, entered.

Petition.

UNITED STATES BOARD OF TAX APPEALS

R. SIMPSON & CO., INC., *Petitioner,* *against* COMMISSIONER OF INTERNAL REVENUE, *Respondent.*	DOCKET NO. 98208

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (I.T:R:A:3:4) dated January 31, 1939, and as a basis of this proceeding alleges as follows:

1. The petitioner is a corporation organized to do a pawnbroking business under the Laws of the State of New York on July 1st, 1918, with its principal place of business at No. 143 West 42nd Street, New York, N. Y. It is a direct successor to a business organization established in New York in 1827.

2. The notice of deficiency (a copy of which is attached and marked Exhibit "A") is dated January 31st, 1939, and was mailed to petitioner on or about that date.

3. The taxes in controversy purport to be surtaxes and penalties on a personal holding corporation for the calendar years and in the amounts as follows:

Year	*Deficiency*	*Penalty*
1934	$19,563.02	$4,890.76
1935	29,355.07	7,338.77
1936	2,731.97	682.99
	$51,650.06	$12,912.52

4. The determination of tax set forth in the said notice of deficiency is based upon the following errors:

(a) That petitioner is alleged to be a personal holding corporation as specified in section 351 (b) (1) (A) and (B) (C) (D) and (E) and is subject to taxation imposed at the rates set forth in section 351 (a) of the Revenue Acts of 1934 and 1936;

(b) And having failed to file personal holding company returns form 1120H, within the time prescribed by law, twenty-five per centum (25%) of the tax has been added in accordance with the provisions of section 291 of the Revenue Acts of 1934 and 1936 and section 406 of the Revenue Act of 1935.

5. The facts upon which the petitioner relies as the basis of this proceeding are as follows:

(a) The petitioner was incorporated under the Laws of the State of New York July 1st, 1918—*sixteen years before* the enactment of the Revenue Act of 1934 which provides for taxing of personal holding corporations as such.

(b) The petitioner is now and has been conducting a definite and recognized business, its operations being specifically controlled by Laws of the State of New York, the City of New York, and political sub-divisions thereof.

(c) Petitioner is required to daily report to the Police Department of the City of New York giving a complete description of each article pledged, the sex of pledgor, amount of loan, number of loan ticket, etc. Failure to comply with the foregoing laws and regulations would necessitate the discontinuance of the business.

(d) The petitioner has more than twenty (20) employees in two (2) stores which it operates. The character of the business demands unusual experience, skill and integrity of its officers and employees in the matter of appraisals of precious stones, jewelry, platinum, gold, etc. in carrying on its business, and because of the particular experience and risk involved, it is unlikely that a corporation of this kind would have more than five (5) stockholders.

(e) The operation of petitioner's business is just as essential to public welfare as banking, as it makes available cash on certain classes of collateral not generally accepted as security, and like banking is a quasi-public business subject to particular and restrictive regulations not applicable to corporations generally or to personal holding corporations. The demand for this semi-public service is evidenced by the large amount of pledges accepted by petitioner, which were extensive enough to oblige petitioner to itself borrow funds to properly carry on its business.

(f) To subject this petitioner to surtax as a personal holding corporation is discriminatory and results in creating an inequitable hardship on a taxpayer carrying on a recognized business enterprise, because it receives its income from certain sources and because of its corporate structure, whereas other corporations carrying on businesses of other kinds are free to conduct said businesses without the hazard of being classed as personal holding companies.

(g) It was not the intent of Congress when drafting the Revenue Acts to subject to surtax as a personal holding corporation productive and operating businesses, subject to local laws and regulations as is this petitioner, but to reach

the "incorporated pocketbook" where income is received on concentrated assets and to compel the distribution of income.

(h) Even assuming, although not admitting, that petitioner was subject to surtax as a personal holding company, the assessment of penalties should be abated. The returns of petitioner for 1934, 1935 and 1936 had been regularly examined by the Treasury Department, and with the exception of some adjustments, had been approved and it was not until by letter dated March 14, 1938, (a copy of which is attached and marked exhibit "B") and after petitioner's 1937 return had been filed, that it was informed of the proposed assessment as a personal holding company. In view of the foregoing, petitioner had *reasonable cause* for not filing forms 1120H with the returns for the years in question. The Treasury Department itself was unaware and uncertain that petitioner might be subject to tax as a personal holding company.

(i) In the event that petitioner is subject to the taxes in question, objection is made to the omission of allowable deductions by the Treasury Department and the consequent error of computation of tax liability.

(j) The Department having approved in all major respects the taxpayer's returns for the years 1934, 1935 and 1936 and thereby assuring the petitioner that it had properly prepared its returns, filed all necessary returns and paid its total tax liability and therefore was not subject to further taxes, is barred from attempting to subject the petitioner to additional taxes for said years.

WHEREFORE, the petitioner prays that this Board may hear the proceeding and determine that the Commissioner

has erroneously assessed a deficiency of surtax and penalties against petitioner as a personal holding company, and that said deficiencies assessed against petitioner for the calendar years 1934, 1935 and 1936 should be set aside and held for naught.

R. Simpson & Co., Inc.
By: R. C. Simpson
Petitioner.

State of New York }
County of New York } ss.:

R. C. Simpson, being duly sworn, says that he is President of R. Simpson & Co., Inc., the petitioner above named; that he has authority to act for petitioner; that he has read the foregoing petition and is familiar with the statements contained therein, and that the facts stated are true, except as to those facts stated to be alleged upon information and belief, and those facts he believes to be true.

R. C. Simpson

Subscribed and sworn to
before me this 22nd
day of April, 1939.

Ernest L. Weiler
Notary Public

[notarial seal]

EXHIBIT "A"

TREASURY DEPARTMENT
Washington

Office of
Commissioner of Internal Revenue

Jan 31 1939

R. Simpson & Co., Inc.,
143 West 42nd Street,
New York, New York.

Sirs:

You are advised that the determination of your personal holding company surtax liability for the taxable years ended December 31, 1924, 1935 and 1936, discloses a deficiency of $51,650.06, and a penalty of $12,912.52, as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency mentioned.

Within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the ninetieth day) from the date of the mailing of this letter, you may file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:C1:P-7. The signing and filing of this form will expedite the closing of your returns by permitting an early assessment of the deficiency, and will prevent the accumulation of interest, since the interest period terminates

thirty days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully,

GUY T. HELVERING,
Commissioner,

By JOHN R. KIRK
Deputy Commissioner.

Enclosures:

Statement
Form of waiver

STATEMENT

IT:R:A:3:4
GPS-90D

R. Simpson & Co., Inc.,
143 West 42nd Street,
New York, New York.

Tax Liability for Taxable Years Ended
December 31, 1934, 1935 and 1936.

Personal Holding Company Surtax

Year	*Liability*	*Assessed*	*Deficiency*	*Penalty*
1934	$19,563.02	None	$19,563.02	$ 4,890.76
1935	29,355.07	None	29,355.07	7,338.77
1936	2,731.97	None	2,731.97	682.99
Totals	$51,650.06	None	$51,650.06	$12,912.52

In making this determination of your personal holding company surtax liability, careful consideration has been given to the internal revenue agent's reports dated February 29, 1936, February 26, 1937, January 3, 1938, February 18, 1938 and March 15, 1938; to your protests dated April 1, 1936 and March 25, 1938 and April 11, 1938; and to the statements made at the conferences held on May 22, 1936 and May 24, 1938.

Inasmuch as you failed to file personal holding company returns, form 1120H, within the time prescribed by law, twenty-five per centum of the tax has been added thereto in accordance with the provisions of section 291 of the Revenue Acts of 1934 and 1936 and section 406 of the Revenue Act of 1935.

Since more than eighty percent of your gross income for the taxable years ended December 31, 1934, December 31, 1935 and December 31, 1936, is derived from interest and dividends, and since more than fifty percent of the capital stock is owned by less than five stockholders, as specified in section 351(b)(1)(A) and (B)(C)(D) and (E), it is held that your corporation qualifies as a personal holding company, and is subject to taxation imposed at the rates set forth in section 351(a) of the Revenue Acts of 1934 and 1936.

A copy of this letter and enclosures has been mailed to your representative, Mr. Francis F. Stevens, 14 Wall Street, New York, New York, in accordance with the authority contained in the power of attorney executed by you and on file with the Bureau.

Petition

1934

Adjustment to Net Income

Net income shown in revenue agent's report dated February 29, 1936, to which you have agreed, and which report is made a part of this letter	$203,727.87
Net Income adjusted	$203,727.87

Explanation of Adjustment

No change has been made in the net income as previously determined.

Computation of Tax

Income Tax under section 13 of Revenue Act of 1934

Net income adjusted		$203,727.87
Income tax at 13¾%		$ 28,012.58
Total tax liability		$ 28,012.58
Income tax assessed:		
Original, account =400055	$26,900.06	
Additional, July 1936 list, =520049	1,112.52	
Total assessed		28,012.58
Deficiency of income tax		None

Computation of Surtax under section 351

Net income	$203,727.87
Less:	
Federal income, war profits and excess-profits taxes	20,294.02
Adjusted net income	$183,433.85

Petition

Loss:		
Exemption—20%	$36,686.77	
Dividends paid during year	81,537.00	
		$118,223.77
Undistributed adjusted net income		$ 65,210.08
Surtax 30%		$ 19,563.02
Surtax previously assessed		None
Deficiency of surtax		$ 19,563.02
Add:		
25% of the tax as an addition for failure to file a return of personal holding company, form 1120H		4,890.76
Deficiency of surtax and penalty		$ 24,453.78

1935

Adjustment to Net Income

Net income shown in revenue agent's report dated February 26, 1937, to which you have agreed, and which report is made a part of this letter	$243,824.33
Net income adjusted	$243,824.33

Explanation of Adjustment

No change has been made in the net income as previously determined.

Computation of Tax

Income Tax under section 13 of Revenue Act of 1934

Net income adjusted	$243,824.33
Income tax at 13¾%	$ 33,525.85
Total tax liability	$ 33,525.85

Petition

Income tax assessed:		
Original, account =400011	$32,713.97	
Additional, April 1937 list, =520065	811.88	
Total assessed		33,525.85
Deficiency in income tax		None

Excess-profits Tax

Net income for excess-profits tax computation		$243,824.33
Less:		
12½% of $1,861,853.52, adjusted declared value of capital stock		232,731.69
Amount subject to excess-profits tax		$ 11,092.64
Excess-profits tax at 5%		$ 554.63
Excess-profits tax assessed:		
Original, account =400011	$259.40	
Additional, April 1937 list, =520065	295.23	
Total assessed		554.63
Deficiency in excess-profits tax		None

Computation of Surtax under Section 351

Net income		$243,824.33
Less:		
Federal income, war-profits and excess-profits taxes		26,532.88
Adjusted net income		$217,291.45

Less:		
Exemption 20%	$43,458.29	
Dividends paid	75,982.91	
		119,441.20
Undistributed adjusted net income		$ 97,850.25
Surtax 30%		$ 29,355.07
Surtax previously assessed		None
Deficiency of surtax		$ 29,355.07
Add:		
25% of the tax as an addition for failure to file a return of personal holding company, form 1120H		7,338.77
Deficiency of surtax and penalty		$ 36,693.84

1936

Adjustment to Net Income

Net income shown in revenue agent's report dated January 3, 1938, to which you have agreed, and which report is made a part of this letter	$171,362.02
Net income adjusted	$171,362.02

Explanation of Adjustment

No change has been made in the net income as previously determined.

Computation of Tax

Excess-Profits Tax

Taxable net income	$171,362.02
Less:	
10% of $2,000,000.00 value of capital stock as declared in your capital stock tax return for year ended June 30, 1936	200,000.00
Net income subject to excess-profits tax	None

Petition

Excess-profits tax assessed:	
Original, account #403018	None
Deficiency in excess-profits tax	None

Income Tax

Normal Tax:	
Taxable net income	$171,362.02
Less:	
Excess-profits tax	None
Net income for normal tax computation	$171,362.02
8% of $2,000.00	$ 160.00
11% of $13,000.00	1,430.00
13% of $25,000.00	3,250.00
15% of $131,362.02	19,704.30
Total normal tax	$ 24,544.30
Surtax on Undistributed Profits:	
Taxable net income	$171,362.02
Less:	
Normal tax	24,544.30
Adjusted net income	$146,847.72
Less:	
Dividends paid credit	93,532.19
Undistributed net income	$ 53,285.53
Amount subject to surtax	$ 53,285.53
7% of $14,681.77	$ 1,027.72
12% of $14,681.77	1,761.81
17% of $23,921.99	4,066.74
Amount of tax	$ 6,856.27

Total surtax		$ 6,856.27
Normal tax		24,544.30
Total income tax (normal tax and surtax)		$ 31,400.57
Income tax assessed (normal tax and surtax):		
Original, account =403018	$27,362.85	
Additional, February 1938 list, account =520073	4,037.72	
Total assessed		31,400.57
Deficiency of income tax		None
Computation of Surtax under section 351		
Net income		$171,362.02
Less:		
Federal income, war profits and excess-profits taxes		34,085.89
Adjusted net income		$137,276.13
Less:		
Exemption 20%	$27,455.23	
Dividends paid credit	93,532.19	
		120,987.42
Undistributed adjusted net income		$ 16,288.71
Amount taxable at 8%—$2,000.00		$ 160.00
Amount taxable at 18%—$14,288.71		2,571.97
Total surtax		$ 2,731.97
Surtax previously assessed		None
Deficiency in surtax		$ 2,731.97
Add:		
25% of tax as an addition for failure to file personal holding company, form 1120H		682.99
Deficiency of surtax and penalty		$ 3,414.96

Petition

EXHIBIT "B"

Pl-1c

TREASURY DEPARTMENT
Washington

Office of
Commissioner of Internal Revenue

IT:A:4
GPS

Mar 14 1938

R. Simpson & Co., Inc.,
143 West 42nd Street,
New York, New York.

Sirs:

A review of the report submitted by the internal revenue agent in charge, 341 Ninth Avenue, New York, New York, covering your tax liability for the taxable years ended December 31, 1934 and 1935, discloses a deficiency in surtax of $45,254.22 and a 25% penalty of $11,313.55, as set forth in the statement attached.

If you agree to the determination of your tax liability, you are requested to execute the enclosed form and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:A:4:GPS. The signing of this form will permit a prompt assessment of the deficiency and thus prevent the accumulation of interest, since the interest period terminates thirty days after filing the form, or on the date assessment is made, whichever is earlier. IF THIS FORM IS NOT EXECUTED AND FILED, INTEREST AT THE RATE OF 6 PER CENT PER ANNUM WILL ACCUMULATE.

It will be appreciated if you will make a reply to this letter within fifteen days from the date thereof by returning the enclosed form properly executed or by the submis-

sion of a protest in accordance with the instructions contained in the accompanying statement.

Respectfully,

JOHN R. KIRK
Deputy Commissioner.

Enclosures:

Form 870
Statement

STATEMENT

IT:A:4
GPS

R. Simpson & Co., Inc.,
143 West 42nd Street,
New York, New York.

Tax Liability for Taxable Years Ended
December 31, 1934 and 1935

Surtax (Section 351)

	Liability	*Assessed*	*Deficiency*	*Penalty*
1934	$17,710.57	None	$17,710.57	$ 4,427.64
1935	27,543.65	None	27,543.65	6,885.91
Totals	$45,254.22	None	$45,254.22	$11,313.55

In making this determination of your income tax liability, careful consideration has been given to the internal revenue agent's report dated February 29, 1936, copy of which has been furnished you, and which report is made a part hereof; to your protest dated April 1, 1936; and to the statements made at the conference held on May 22, 1936.

Petition

Inasmuch as you failed to file personal holding company returns, forms 1120H, within the time prescribed by law, twenty-five per centum of the tax has been added thereto in accordance with the provisions of section 291 of the Revenue Act of 1934, and section 406 of the Revenue Act of 1935.

Since more than eighty percent. of your gross income for the taxable years ended December 31, 1934 and December 31, 1935 is derived from interest and dividends and since more than fifty per cent. of the capital stock is owned by less than five stockholders, as specified in section 351(b)(1)(A) and (B)(C)(D) and (E), it is held that your corporation qualifies as a personal holding company, and is subject to taxation imposed at the rates set forth in section 351(a) of the Revenue Act of 1934.

Adjustments to Net Income

1934

Net income shown in revenue agent's report dated February 29, 1936, copy of which has been furnished you and to which you have agreed	$203,727.87
Net income adjusted	$203,727.87

Explanation of Adjustments

No change has been made in the net income as previously determined.

Computation of Tax

Income Tax under section 13 of Revenue Act of 1934

Net income adjusted	$203,727.87
Income tax at 13¾%	$ 28,012.58
Total tax liability	$ 28,012.58

Income tax assessed:		
Original, account #400055	$26,900.06	
Additional, July, 520049 — 1936 list	1,112.52	
Total assessed	$28,012.58	28,012.58
Deficiency of income tax		$ None

Computation of Surtax under Section 351

Net income		$203,727.87
Less:		
Federal income, war profits, and excess-profits taxes		28,012.58
Adjusted net income		$175,715.29
Exemption—20%	$35,143.06	
Dividends paid during year	81,537.00	116,680.06
Undistributed adjusted net income		$ 59,035.23
Surtax 30%		$ 17,710.57
Surtax previously assessed		None
Deficiency of surtax		$ 17,710.57
Add:		
25% of the tax as an addition for failure to file a return of Personal Holding Company, form 1120H		4,427.64
Total surtax and penalty		$ 22,138.21

Petition

1935

Adjustments to Net Income

1935

Net income shown in revenue agent's report dated February 26, 1937, copy of which has been furnished you and to which you have agreed	$243,824.33
Net income adjusted	$243,824.33

Explanation of Adjustments

No change has been made in the net income as previously determined.

Computation of Tax

Income Tax under section 13 of Revenue Act of 1934

Net income adjusted		$243,824.33
Income tax at 13¾%		$ 33,525.85
Total tax liability		$ 33,525.85
Income tax assessed:		
Original, account =400011	$32,713.97	
Additional, April 520065, 1937 List	811.88	
Total assessed		33,525.85
Deficiency in income tax		$ None

Excess-Profits Tax

Net income for excess-profits tax computation	$243,824.33
Less: 12½% of $1,861,853.52, adjusted declared value of capital stock	232,731.69
Amount subject to excess-profits tax	$ 11,092.64
Excess-profits tax at 5%	$ 554.63

Petition

Excess-profits tax assessed:		
Original, account =400011	$259.40	
Additional, April 520065—1937 list	295.23	
Total assessed		554.63
Deficiency in excess-profits tax		$ None

Computation of Surtax under section 351

Net income		$243,824.33
Less: Federal income, war-profits, and excess-profits taxes		34,080.48
Adjusted net income		$209,743.85
Adjusted net income		$209,743.85
Exemption 20%	$41,948.77	
Dividends paid	75,982.91	117,931.68
Undistributed adjusted net income		$ 91,812.17
Surtax 30%		$27,543.65
Surtax previously assessed		None
Deficiency of surtax		$27,543.65
Add:		
25% of the tax as an addition for failure to file a return of Personal Holding Co., form 1120H		6,885.91
Total surtax and penalty		$34,429.56

Answer.

UNITED STATES BOARD OF TAX APPEALS

R. SIMPSON & CO., INC., *Petitioner*, v. COMMISSIONER OF INTERNAL REVENUE, *Respondent*.	DOCKET NO. 98208.

Comes now the Commissioner of Internal Revenue, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and for answer to the petition filed in the above-entitled proceeding admits and denies as follows:

1. Admits the allegations contained in the first sentence of paragraph 1 of the petition but denies all other allegations contained in said paragraph.

2 and 3. Admits the allegations contained in paragraphs 2 and 3 of the petition.

4 (a) and (b). Denies that the respondent erred as alleged in subparagraphs (a) and (b) of paragraph 4 of the petition.

5 (a). Admits the allegations contained in subparagraph (a) of paragraph 5 of the petition.

5 (b) to (j), both inclusive. Denies the allegations contained in subparagraphs (b) to (j), both inclusive of paragraph 5 of the petition.

Answer

Denies generally and specifically each and every allegation contained in the petition not hereinbefore specifically admitted qualified or denied.

WHEREFORE, it is prayed that the determination of the respondent be in all things approved.

J. P. WENCHEL
ECA

J. P. WENCHEL,
Chief Counsel,
Bureau of Internal Revenue.

OF COUNSEL:

E. O. HANSON,
Division Counsel.

CONWAY N. KITCHEN,
Special Attorney,
Bureau of Internal Revenue.

Findings of Fact and Opinion.

UNITED STATES BOARD OF TAX APPEALS

R. SIMPSON & CO., INC., PETITIONER, *v.* COMMISSIONER OF INTERNAL REVENUE, RESPONDENT.

Docket No. 98208. Promulgated May 14, 1941.

1. Corporation actively engaged in the business of pawnbroker, and more than 50 percent of the stock of which was owned by less than 5 individuals, *held* to be a personal holding company within meaning of Revenue Acts of 1934 and 1936, section 351. *Notcman v. Welch*, 108 Fed. (2d) 206, followed.

2. Failure to file personal holding company returns *held* to justify imposition of penalties.

Gerald Donovan, Esq., for the petitioner.
Conway Kitchen, Esq., for the respondent.

Respondent determined deficiencies in petitioner's surtax liability and added 25 percent penalties for failure to file personal holding company returns as follows:

Year	*Deficiency*	*Penalty*
1934	$19,563.02	$4,890.76
1935	29,355.07	7,338.77
1936	2,731.97	682.99

The full amounts of the deficiencies and penalties are in issue in this proceeding. The questions presented are whether petitioner, engaged in business as a pawnbroker, is a personal holding company within the meaning of section 351 of the Revenue Acts of 1934 and 1936, and, if so, whether it is liable for the penalties proposed to be assessed for failure to file personal holding company returns.

FINDINGS OF FACT.

Petitioner was incorporated under the laws of New York on July 1, 1918. During the taxable years it had two places of business, the principal one at 143 West 42d Street and the other on Broadway at the corner of 67th Street, both in the city of New York. It was qualified to conduct a general pawnbroking and loan business upon pledges of personal property, and was licensed to conduct such business by the Bureau of Licenses of New York City. Petitioner continued in corporate form a business that was established in 1827 and which had been conducted first by one Robert Simpson and then by his nephew, Thomas Simpson, father of the present head of the company. The incorporation was decided upon in 1918 when Thomas Simpson was getting along in years and his son was in the Army.

A summary of petitioner's activities during the taxable years is as follows:

	1934	*1935*	*1936*
Number of pledges issued	32,131	32,045	28,673
Amount loaned	$2,489,617.86	$2,502,604.22	$2,390,217.23
Number of pledges redeemed	28,543	29,118	28,138
Number of pledges booked for sale	7,452	8,561	8,192
Number of pledges sold	2,941	3,167	2,841
Gross income	$428,437.49	$469,386.95	$410,576.81
Reported in Federal income tax returns as interest on loans, etc.	$422,437.49	$442,545.28	$407,464.53

Findings of Fact and Opinion

Petitioner employs 12 appraisers at its 42d Street store and 4 appraisers at its 67th Street store. As a rule there are approximately twice as many applications for loans as there are loans actually made. The average rate of interest on the loans is between 15 and 17 percent. If the appraisal of jewelry and its safekeeping were not required and if compliance with the law and police regulations and the auctioning and the accounting for surplus moneys were not necessary, the rate of interest computed with respect to the same volume of business could be reduced by 30 percent.

Petitioner, during the taxable years, was actively engaged in the conduct of business with the general public in the operation of its pawn shops. It loaned money on personal property consisting almost entirely of jewelry. During the years 1934, 1935, and 1936 more than 50 percent of its capital stock was owned by less than five stockholders. More than 80 percent of its gross income for the taxable years was derived from interest.

On or before the due dates petitioner filed its complete income and excess profits tax returns, Form 1120, for the taxable years. The question asked on each return, whether the reporting corporation was a personal holding company within the meaning of section 351 of the applicable revenue acts, was answered in the negative. The form of return for each of the three years advised the taxpayer that if it was a personal holding company the filing of an additional return on Form 1120-H was required. Petitioner also filed information returns, Form 1096, with the attached Form 1099 listing the amounts of dividends over $300 paid to its stockholders, for the years in question. Petitioner's books and records, which gave some indication that more than 50 percent of its stock was owned by less than five stockholders and disclosed that at least 80 percent of its income was

derived from interest, were at all times available to respondent and were actually made available to respondent's agents during audit of the income tax returns for the taxable years.

Petitioner did not file personal holding company returns, Form 1120-H, for the taxable years. Robert C. Simpson, who has been president of petitioner since 1932 and was its treasurer from 1922 until 1932 and who executed its income tax returns for the years in question, having personally prepared the returns for two of the years, was aware of the provisions of section 351 of the Revenue Acts of 1934 and 1936 and the requirements with respect to the filing of personal holding company returns. He did not file personal holding company returns on behalf of petitioner for the taxable years because he thought petitioner was not a personal holding company within the meaning of section 351.

During the years 1934, 1935, and 1936 petitioner was a personal holding company within the meaning of section 351 of the applicable revenue acts.

OPINION.

OPPER: Every argument advanced by petitioner in its principal brief save one was made and considered unfavorably in *Noteman* v. *Welch* (C. C. A., 1st Cir.), 108 Fed. (2d) 206. See also *Seaboard Small Loan Corporation*, 42 B. T. A. 715; *O'Sullivan Rubber Co.*, 42 B. T. A. 721. Efforts to distinguish the *Noteman* case in the reply brief on the basis of details of operation of a pawn shop as compared to a "personal finance company", even if borne out by the record or authority which they are not, must be unavailing as falling short of impeaching the underlying principle. We

may consider that "the taxpayer makes out an appealing case, but mindful of the limits of our judicial function, we cannot save the taxpayer from an exaction which Congress required of it * * *." *Noteman* v. *Welch*, *supra*, 215.

Petitioner attacks the constitutionality of the section if applied to its situation, a question not expressly raised in the *Noteman* case on appeal. But see 26 Fed. Supp. 437, 442. We think, however, that it was inferentially disposed of. The contention is that the section 351 surtax would operate in an arbitrary and discriminatory fashion upon petitioner. In *Noteman* v. *Welch*, *supra*, 209, the Court quotes Congressional Committees to show "that the bill would work no real hardship upon any corporation except one that was being used to reduce the surtaxes of its stockholders, because the corporation 'can always escape this tax by distributing to its stockholders at least 90 percent of its adjusted net income.'" In the case of corporations having a handful of shareholders, a class to which the operation of the section is confined, such a distribution would scarcely cause the sort of significant burden requiring resort to the dignity and consequence of the Federal Constitution. And if corporations whose stock is more widely held are expressly omitted from the regulated group, the classification is for that very reason deprived of any discriminatory or arbitrary quality. The line may have been drawn unfortunately for petitioner, but wherever drawn someone could frustrate it if petitioner can here. Nor can it be a legitimate cause of complaint that Congress has chosen to make the section applicable to petitioner by the device of definition and characterization as a "holding company." While petitioner may not be a holding company for purposes of other statutes, it suffers no detriment by being called one here except such as would be equally severe if it were defined

merely as a "taxpayer." Cf. *Helvering* v. *City Bank Farmers Trust Co.*, 296 U. S. 85.

The penalty for failing to file a personal holding company return is mandatory for the years 1934 and 1935, since no return was ever filed. *Noteman* v. *Welch*, *supra*. By the time the 1936 return was due, the statute had been in effect for practically three years. Each corporation income tax form had asserted the necessity that petitioner file such a return if it were a personal holding company, and petitioner's failure to file was due entirely to its erroneous impression that it was not one. This can not be the reasonable cause required by the penalty section, *Lone Pine Lawn Corporation*, 41 B. T. A. 638, and requires approval of respondent's imposition of the penalty, *Lane-Wells Co.*, 43 B. T. A. 463, without the necessity of passing upon petitioner's contention that under the wording of the 1936 Act a showing of reasonable cause entitled the taxpayer to a remission of the imposition in spite of the complete absence of even a delinquent filing.

Decision will be entered for the respondent.

Decision and Order.

UNITED STATES BOARD OF TAX APPEALS
WASHINGTON

R. SIMPSON & CO., INC., *Petitioner,* v. COMMISSIONER OF INTERNAL REVENUE, *Respondent.*	DOCKET NO. 98208

DECISION

Pursuant to the determination of the Board, as set forth in its Findings of Fact and Opinion, promulgated May 14, 1941, it is

ORDERED and DECIDED: That there are deficiencies in surtax liability and penalties, as follows:

Year	*Deficiency*	*Penalty*
1934	$19,563.02	$4,890.76
1935	29,355.07	7,338.77
1936	2,731.97	682.99

Entered May 20, 1941.

(s) CLARENCE V. OPPER,
Member.

(SEAL OF UNITED STATES BOARD OF TAX APPEALS)

Stipulation of Venue.

UNITED STATES BOARD OF TAX APPEALS

R. Simpson & Co., Inc., *Petitioner,* *against* Commissioner of Internal Revenue, *Respondent.*	B.T.A. Docket No. 98208.

Stipulation Agreeing Upon Venue on Petition to Review Decision of Board of Tax Appeals.

It is hereby stipulated and agreed by and between the parties to the above-entitled cause, by their respective undersigned attorneys, that the decision of the United States Board of Tax Appeals in said cause may be reviewed by the United States Circuit Court of Appeals for the Second Circuit.

Gerald Donovan
Gerald Donovan
Attorney for Petitioner
No. 14 Wall Street,
New York City, New York.

Samuel O. Clark, Jr.
Assistant Attorney General,
Attorney for Respondent.

Petition for Review.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SECOND CIRCUIT

R. SIMPSON & CO., INC., *Petitioner,* *against* COMMISSIONER OF INTERNAL REVENUE, *Respondent.*	B.T.A. DOCKET No. 98208.

PETITION FOR REVIEW BY THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT OF THE DECISION OF THE UNITED STATES BOARD OF TAX APPEALS.

To the Honorable, the Judges of the United States Circuit Court of Appeals for the Second Circuit:

Now comes R. Simpson & Co., Inc., by its attorney, Gerald Donovan and petitions the United States Circuit Court of Appeals for the Second Circuit for a review of the decision and order of the United States Board of Tax Appeals, rendered and entered on May 20, 1941, 44 B.T.A. 498, No. 80, in the cause numbered 98208 on the docket of said Board, wherein said R. Simpson & Co., Inc., was petitioner and the Commissioner of Internal Revenue was respondent, and, in support of its petition, respectfully shows this Honorable Court as follows:

I. Jurisdiction and Venue.

The petitioner, R. Simpson & Co., Inc., is a corporation duly organized and existing under and by virtue of the

laws of the State of New York with its principal office in New York City, N. Y. The petitioner did not file personal holding company surtax returns for any of the taxable years, 1934, 1935 or 1936.

On or about the 14th day of August, 1941, the attorney for the petitioner and the attorney for the respondent, Commissioner of Internal Revenue, entered into a stipulation in writing whereby they designated the United States Circuit Court of Appeals for the Second Circuit as the appropriate court for review of the aforesaid decision of the United States Board of Tax Appeals.

II. Prior Proceedings.

The respondent Commissioner determined deficiencies in petitioner's personal holding company surtax liability and added twenty-five percent. penalties for failure to file personal holding company surtax returns as follows:

Year.	*Deficiency.*	*Penalty.*	*Total.*
1934	$19,563.02	$4,890.76	$24,453.78
1935	29,355.07	7,338.77	36,693.84
1936	2,731.97	682.99	3,414.96
	$51,650.06	$12,912.52	$64,562.58

Thereafter petitioner filed its appeal from the notice of deficiency with the United States Board of Tax Appeals. The hearing of said appeal by the said Board was held on December 9, 10 and 13, 1940. On May 14, 1941, the Board of Tax Appeals promulgated its findings of fact and opinion in said appeal, and on May 20, 1941, the Board rendered its decision and entered its final order of redetermination in said appeal, wherein and whereby it decided and ordered that there were deficiencies and penalties for the taxable years as above set forth.

III. Nature of the Controversy.

The principal questions, presented by the record and this petition for review, are whether, during the taxable years in question, the petitioner, a corporation found by the Board to have been "actively engaged in the conduct of business with the general public in the operation of its pawn shops", was a personal holding company within the meaning of Section 351 of the Revenue Acts of 1934 and 1936 or either of said acts; and in the event that petitioner is held to be a personal holding company within the meaning of both or either of said acts, whether the application of said statutes, or either of them, to petitioner is constitutional under the organic law of the United States of America; and whether said statutes, or either of them, as applied to petitioner are constitutional under the organic law of the United States of America.

IV. Designation of Court of Review.

The said petitioner, being aggrieved by the said findings of fact and conclusions of law, contained in the said findings and opinion of the Board, and by its decision and final order, rendered and entered thereon, desires to obtain a review thereof by the United States Circuit Court of Appeals for the Second Circuit.

V. Assignment of Errors.

The petitioner alleges that, in the record and proceedings before the United States Board of Tax Appeals and in the decision and final order of redetermination, rendered and entered by the Board, manifest errors occurred and intervened to the prejudice of the petitioner, as follows:

1. The Board erred in concluding that, during the year 1934, petitioner was a personal holding company within the

meaning of section 351 of the applicable revenue acts, or of any applicable revenue act, and further erred in not concluding that petitioner was not a personal holding company within the meaning of any applicable revenue act.

2. The Board erred in concluding that, during the year 1935, petitioner was a personal holding company within the meaning of section 351 of the applicable revenue acts, or of any applicable revenue act, and further erred in not concluding that petitioner was not a personal holding company within the meaning of any applicable revenue act.

3. The Board erred in concluding that, during the year 1936, petitioner was a personal holding company within the meaning of section 351 of the applicable revenue acts, or of any applicable revenue act, and further erred in not concluding that petitioner was not a personal holding company within the meaning of any applicable revenue act.

4. The Board erred in concluding, as to the petitioner, that more than eighty percent. of its gross income for the taxable years was derived from interest, and further erred in not concluding that less than eighty percent. of its gross income for the taxable years was derived from interest, royalties, dividends, annuities and gains from the sale of stock or securities.

5. The Board erred in concluding that the average rate of interest on the loans is between 15 and 17 percent. and further erred in not concluding that the average rate of interest on the loans was less than 12 percent.

6. The Board erred in concluding that petitioner's books and records disclosed that at least eighty percent. of its income was derived from interest, and further erred in not concluding that petitioner's books and records dis-

closed that less than eighty percent. of its income was derived from interest.

7. The Board erred in concluding that at least eighty percent. of petitioner's income, during the years in question or any one of them, was derived from interest, and further erred in not concluding that less than eighty percent. of petitioner's income during the years in question, or any one of them, was derived from interest.

8. The Board erred in concluding that petitioner did not show reasonable cause for failure to file a personal holding company surtax return for the year 1934, and further erred in not concluding that petitioner did show reasonable cause for failure to file a personal holding company surtax return for the year 1934.

9. The Board erred in concluding that petitioner did not show reasonable cause for failure to file a personal holding company surtax return for the year 1935, and further erred in not concluding that petitioner did show reasonable cause for failure to file a personal holding company surtax return for the year 1935.

10. The Board erred in concluding that petitioner did not show reasonable cause for failure to file a personal holding company surtax return for the year 1936, and further erred in not concluding that petitioner did show reasonable cause for failure to file a personal holding company surtax return for the year 1936.

11. The Board erred in holding that, during the year 1934, petitioner was a personal holding company within the meaning of section 351 of the applicable revenue acts, or of any applicable revenue act, and further erred in not holding that petitioner was not a personal holding company within the meaning of any applicable revenue act.

12. The Board erred in holding that, during the year 1935, petitioner was a personal holding company within the meaning of section 351 of the applicable revenue acts, or of any applicable revenue act, and further erred in not holding that petitioner was not a personal holding company within the meaning of any applicable revenue act.

13. The Board erred in holding that, during the year 1936, petitioner was a personal holding company within the meaning of section 351 of the applicable revenue acts, or of any applicable revenue act, and further erred in not holding that petitioner was not a personal holding company within the meaning of any applicable revenue act.

14. The Board erred in holding, as to the petitioner, that more than eighty percent. of its gross income for the taxable years was derived from interest, and further erred in not holding that less than eighty percent. of its gross income for the taxable years was derived from interest, royalties, dividends, annuities and gains from the sale of stock or securities.

15. The Board erred in holding that the average rate of interest on the loans is between 15 and 17 percent. and further erred in not holding that the average rate of interest on the loans was less than 12 percent.

16. The Board erred in holding that petitioner's books and records disclosed that at least eighty percent. of its income was derived from interest, and further erred in not holding that petitioner's books and records disclosed that less than eighty percent. of its income was derived from interest.

17. The Board erred in holding that at least eighty percent. of petitioner's income, during the years in question or any one of them, was derived from interest, and further

erred in not holding that less than eighty percent. of petitioner's income during the years in question, or any one of them, was derived from interest.

18. The Board erred in holding that petitioner did not show reasonable cause for failure to file a personal holding company surtax return for the year 1934, and further erred in not holding that petitioner did show reasonable cause for failure to file a personal holding company surtax return for the year 1934.

19. The Board erred in holding that petitioner did not show reasonable cause for failure to file a personal holding company surtax return for the year 1935, and further erred in not holding that petitioner did show reasonable cause for failure to file a personal holding company surtax return for the year 1935.

20. The Board erred in holding that petitioner did not show reasonable cause for failure to file a personal holding company surtax return for the year 1936, and further erred in not holding that petitioner did show reasonable cause for failure to file a personal holding company surtax return for the year 1936.

21. The Board erred in holding, deciding and ordering that there was any deficiency in personal holding company surtax liability for the taxable year 1934 and, specifically, that there was a deficiency of $19,563.02, and further erred in not holding, deciding and ordering that there was no deficiency for that year.

22. The Board erred in holding, deciding and ordering that there was any deficiency in personal holding company surtax liability for the taxable year 1935 and, specifically, that there was a deficiency of $29,355.07, and further erred

in not holding, deciding and ordering that there was no deficiency for that year.

23. The Board erred in holding, deciding and ordering that there was any deficiency in personal holding company surtax liability for the taxable year 1936 and, specifically, that there was a deficiency of $2,731.97, and further erred in not holding, deciding and ordering that there was no deficiency for that year.

24. The Board erred in holding that there are found here most of the essential features of a personal holding company as prescribed in the cases cited in its opinion, and further erred in not holding that there are found here few or none of the essential features of a personal holding company as prescribed in the cases cited in its opinion or elsewhere in the decisional, statutory or organic law.

25. The Board erred in holding, deciding and ordering that there was any penalty for the taxable year 1934, and, specifically, that there was a penalty of $4,890.76, and further erred in not holding, deciding and ordering that there was no penalty for that year.

26. The Board erred in holding, deciding and ordering that there was any penalty for the taxable year 1935, and specifically, that there was a penalty of $7,338.77, and further erred in not holding, deciding and ordering that there was no penalty for that year.

27. The Board erred in holding, deciding and ordering that there was any penalty for the taxable year 1936, and, specifically, that there was a penalty of $682.99, and further erred in not holding, deciding and ordering that there was no deficiency for that year.

Petition for Review

28. The Board erred in holding that the application to petitioner of the personal holding company surtax provisions of the Revenue Acts of 1934 and 1936, or either of said acts, was constitutional, and not arbitrary and discriminatory, did not deny petitioner the equal protection of the law and did not constitute the taking of petitioner's property without due process of law, and further erred in not holding that the application to petitioner of the personal holding company surtax provisions of the Revenue Acts of 1934 and 1936, or either of said acts, would be unconstitutional, arbitrary and discriminatory, would deny petitioner the equal protection of the law and would constitute the taking of petitioner's property without due process of law.

29. The Board erred in holding that the personal holding company surtax provisions of the Revenue Act of 1934 and 1936, as applied to petitioner, are constitutional, are not arbitrary and discriminatory, do not deny petitioner the equal protection of the law, and do not take petitioner's property without due process of law, and further erred in not holding that the personal holding company surtax provisions of the Revenue Acts of 1934 and 1936, as applied to petitioner, are unconstitutional, arbitrary and discriminatory, deny petitioner the equal protection of the law and take petitioner's property without due process of law.

30. The Board erred in rendering and ordering decision for the respondent and further erred in not rendering and ordering decision for the petitioner.

WHEREFORE, your petitioner prays that this Honorable Court review the decision and order of the United States Board of Tax Appeals and reverse and set aside the same; that a transcript of the record be prepared in accordance

with law and with the rules of this Honorable Court, and transmitted to the Clerk thereof for filing; that appropriate action be taken to the end that the errors complained of may be reversed and corrected by this Honorable Court and the entry of a decision by the Board be directed in favor of the petitioner determining that there are no deficiencies in personal holding company surtaxes and no penalties for failure to file personal holding company surtax returns; and for the entry of such further orders and directions as shall by this Honorable Court be deemed meet and proper and in accordance with law.

(Sgd.) Gerald Donovan
GERALD DONOVAN
Attorney for Petitioner,
No. 14 Wall Street,
New York City, N. Y.

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

GERALD DONOVAN, being duly sworn, deposes and says:

I am the attorney for the petitioner in the above entitled proceeding, and, as such I am duly authorized to verify the foregoing petition for review. I have read the said petition and am familiar with the statements contained therein. The statements therein made are true to the best of my knowledge, information and belief.

(Sgd.) GERALD DONOVAN

Subscribed and Sworn to before me)
this 15th day of August, 1941,)

(Sgd) ERNEST L. WEILER
Notary Public
My Commission expires March 30th, 1943.

[NOTARIAL SEAL]

Proof of Service.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SECOND CIRCUIT

R. SIMPSON & Co., INC., *Petitioner,* *against* COMMISSIONER OF INTERNAL REVENUE, *Respondent.*	B. T. A. DOCKET NO. 98208.

NOTICE OF FILING OF PETITION FOR REVIEW OF DECISION OF THE UNITED STATES BOARD OF TAX APPEALS.

To:

COMMISSIONER OF INTERNAL REVENUE,
Internal Revenue Building,
Washington, D. C.

JOHN P. WENCHEL, Esq., Attorney for Respondent,
Chief Counsel for the Bureau of Internal Revenue,
Internal Revenue Building,
Washington, D. C.

PLEASE TAKE NOTICE, that on August 18, 1941, the undersigned presented to the United States Board of Tax Appeals and filed with the Clerk thereof, the petition of R. Simpson & Co. Inc., for review by the United States Circuit Court of Appeals for the Second Circuit of the final order and decision of said Board in the cause referred to

above. A copy of said petition, and of the assignment of errors is hereto attached and served upon you.

Dated, New York City, N. Y., August 15th, 1941.

(Sgd.) GERALD DONOVAN
Gerald Donovan
Attorney for Petitioner
Office and P. O. Address
No. 14 Wall Street,
New York City, N. Y.

Service of the foregoing notice of filing and of a copy of the petition for review and assignment of errors is hereby acknowledged this 18th day of August, 1941.

(Sgd.) J. P. WENCHEL
Chief Counsel,
Bureau of Internal Revenue
Attorney for Respondent

Praecipe, with Proof of Service.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SECOND CIRCUIT

R. SIMPSON & CO., INC., *Appellant-Petitioner,* *against* COMMISSIONER OF INTERNAL REVENUE, *Appellee-Respondent.*	B. T. A. DOCKET No. 98208

PRAECIPE FOR RECORD

TO THE CLERK OF THE UNITED STATES BOARD OF TAX APPEALS:

You are hereby requested to prepare, transmit and deliver to the Clerk of the United States Circuit Court of Appeals for the Second Circuit, in connection with the Petition for Review by said court, heretofore filed by the Petitioner in the above-entitled cause, a transcript duly certified as correct, of the record in the above-entitled cause, prepared as required by law and by the rules of said court, and to include in said transcript of record copies of the following matters, documents, and records, to wit:

(1) Docket Entries of all proceedings before the United States Board of Tax Appeals.

(2) All pleadings before the United States Board of Tax Appeals, including:

(a) Petition for Redetermination.

(b) Answer of the respondent.

(3) Findings of Fact and Opinion of the United States Board of Tax Appeals.

(4) Order and Decision of the United States Board of Tax Appeals.

(5) Stipulation for Review by the United States Circuit Court of Appeals for the Second Circuit.

(6) Petition for Review and Assignments of Error.

(7) Notice to Respondent of Filing of Petition for Review and Assignments of Error, together with acknowledgment by respondent of service thereof and of a copy of the Petition for Review and Assignments of Error.

(8) This Praecipe for Record, together with acknowledgment by respondent of service thereof.

Gerald Donovan
GERALD DONOVAN,
Attorney for Petitioner,
No. 14 Wall Street,
New York City, N. Y.

Service of a copy of this Praecipe for Record is hereby admitted this 15th day of October, 1941.

J. P. WENCHEL,
Assistant Attorney-General,
Department of Justice,
Attorney for Respondent.

Clerk's Certificate.

UNITED STATES BOARD OF TAX APPEALS

WASHINGTON

R. SIMPSON & CO., INC., *Petitioner,* v. COMMISSIONER OF INTERNAL REVENUE, *Respondent.*	DOCKET NO. 98208

CERTIFICATE

I, B. D. GAMBLE, clerk of the U. S. Board of Tax Appeals, do hereby certify that the foregoing pages, 1 to 47, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praecipe in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of the United States Board of Tax Appeals, at Washington, in the District of Columbia, this 27th day of October, 1941.

B. D. GAMBLE,
Clerk,
United States Board of Tax Appeals.
[SEAL]

Order of Enlargement.

UNITED STATES BOARD OF TAX APPEALS

R. Simpson & Co., Inc., *Petitioner.* v. Commissioner of Internal Revenue, *Respondent.*	Docket No. 98208

Order Enlarging Time

For cause appearing of record, it is

Ordered: That the time for transmission and delivery of the record *sur* petition for review of the above entitled proceeding in the United States Circuit Court of Appeals, Second Circuit, be and it hereby is extended to November 8, 1941.

(Signed) C. R. Arundell
Member

Dated: Wash. D. C.
Oct. 17, 1941.

lj

[fol. 49] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1941

No. 147

(Argued May 19, 1942. Decided June 19, 1942)

R. SIMPSON & Co., INC., Petitioner,

v.

GUY T. HELVERING, Commissioner of Internal Revenue, Respondent

On Petition to Review an Order of the Board of Tax Appeals, Assessing a Deficiency in Income Tax Against the Petitioner for the Years 1934, 1935 and 1936

Before L. Hand, Augustus N. Hand and Chase, Circuit Judges

Gerald Donovan for the petitioner.
Joseph M. Jones for the respondent.

PER CURIAM:

Affirmed as to the first point, on the authority of *Noteman* v. *Welch*, 108 Fed. (2d) 206 (C. C. A. 1); and as to the second, on the authority of *O'Sullivan Rubber Co.* v. *Commissioner*, 120 Fed. (2d) 845 (C. C. A. 2).

[fol. 50] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT.

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 6th day of July one thousand nine hundred and forty-two.

Present: Hon. Learned Hand, Hon. Augustus N. Hand, Hon. Harrie B. Chase, Circuit Judges.

R. Simpson & Co., Inc., Petitioner,

v.

Commissioner of Internal Revenue, Respondent

Appeal from the United States Board of Tax Appeals

This cause came on to be heard on the transcript of record from the United States Board of Tax Appeals, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the order of said United States Board of Tax Appeals be and it hereby is affirmed.

It is further ordered that a Mandate issue to the said Board in accordance with this decree.

D. E. Roberts, Clerk.

[fol. 51] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. R. Simpson & Co., Inc., v. Commissioner of Int. Revenue. Order for Mandate. United States Circuit Court of Appeals, Second Circuit. Filed Jul. 6, 1942. D. E. Roberts, Clerk.

[fol. 52] United States of America; Southern District of New York

I, D. E. Roberts, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 51, inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of R. Simpson & Co., Inc., Petitioner, against Commissioner of Internal Revenue, Respondent, as the same remain of record and on file in my office.

In Testimony Whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this fifth day of September, in the year of our Lord one thousand nine hundred and forty-two, and of the Independence of the said United States the one hundred and sixty-seventh.

D. E. Roberts, Clerk. (Seal.)

[fol. 53] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—June 7, 1943

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit

A motion for leave to file a petition for rehearing and petition for rehearing having been submitted in this case;

Upon consideration thereof, it is ordered by this Court that the motion for leave to file and petition for rehearing be, and the same are hereby, granted.

And it is further ordered that the order denying certiorari, be, and the same is hereby, vacated; and that the petition for writ of certiorari herein be, and the same is hereby, granted, limited to the question presented by the second reason relied upon in the petition for writ of certiorari. In their briefs and on the oral argument, counsel are requested to discuss the question of the jurisdiction of this Court to grant a petition for rehearing in this case. Cf. Helvering v. Northern Coal Co., 293 U. S. 191, section 1140 of the Internal Revenue Code.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

June 7, 1943.

Mr. Justice Rutledge took no part in the consideration or decision of this application.

FILE COPY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 419

R. SIMPSON & CO., INC.,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

GERALD DONOVAN,
Counsel for Petitioner.

Of Counsel:
JAMES T. HEENEHAN,
FRANCIS F. STEVENS.

TABLE OF CONTENTS

TABLE OF CASES CITED.

STATUTES CITED.

OTHER AUTHORITIES CITED.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 419

R. SIMPSON & CO., INC.,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

MAY IT PLEASE THE COURT:

The petitioner, R. Simpson & Co., Inc., by its attorney, Gerald Donovan, respectfully shows to this Honorable Court:

A.

Summary Statement of the Matter Involved:

The principal questions presented are whether, during the taxable years in question (1934, 1935 and 1936), the petitioner, a corporation found by the Board of Tax Appeals to have been "actively engaged in the conduct of busi-

ness with the general public in the operation of its pawn shops" (R. 27) and not found by the Board to have held the securities of, or otherwise to have controlled, any other corporation, person or organization, was a personal holding company within the meaning of Section 351 of the Revenue Acts of 1934 and 1936, respectively, or either of said acts; whether the application to petitioner of said statutes, or either of them, is constitutional under the organic laws of the United States of America; and whether said statutes, or either of them, as applied to petitioner, are constitutional under the organic laws of the United States of America.

Subsidiary questions presented are whether the filing by petitioner of "its complete income and excess-profits tax returns, Form 1120, for the taxable years" (R. 27), the filing by petitioner of "information returns, Form 1096, with the attached Form 1099 listing the amounts of dividends over $300 paid to its stockholders, for the years in question" (R. 27), and the further fact that "petitioner's books and records, which gave some indication that more than 50 per cent of its stock was owned by less than five stockholders and disclosed that at least 80 per cent of its income was derived from interest, were at all times available to respondent and were actually made available to respondent's agents during audit of the income tax returns for the taxable years" (R. 27, 28), constituted in substance and effect the filing of Form 1120-H (personal holding company return) or the equivalent thereof, or, at the very least, relieved petitioner from the imposition of penalties for failure to file said Form 1120-H.

B.

Reasons Relied on for the Issuance of the Writ.

I.

The facts clearly show that the taxpayer corporation is and always has been an active operating corporation engaged in a general pawnbroking and loan business upon pledges of personal property, duly licensed to conduct such active operating business by the Bureau of Licenses of New York City. It is not and never was an "incorporated pocketbook", which the personal holding company surtax was intended to penalize. The attempted application, by the respondent, of these personal holding company tax statutes to the petitioner is an attempt to create, by definition, a status contrary to fact and common sense—an attempt to declare that an active operating corporation is a holding company. And this in the face of holdings by this honorable court that a statute which seeks to create a status and denies a fair opportunity to rebut such classification violates the due process clause of the Fifth Amendment.

It has been said by high authority that the construction of tax statutes is a practical matter. But no one can reasonably assert that the classification and penalization of an innocent operating corporation as an undesired personal holding company, or "incorporated pocketbook" is a requisite to the proper, or even practical, collection of revenue. The attempted classification of the taxpayer as a personal holding company is, therefore, "unnecessary", "inappropriate", "unreasonably harsh" and "oppressive", when viewed in the light of any benefit to be expected by the Government. For the further reason that penalizing this class of taxpayer would not promote the legislative objective, the statutes in question, or such application by

the respondent, would violate the due process clause if imposed upon this active operating corporation.

The question here presented involves an important question of law, which, it is submitted, is controlled by principles of Federal tax law already laid down by this high Court, but not as yet dealt with by it in any case relating to personal holding company surtaxes. It is necessary for the public interest, particularly in this period of rapidly increasing taxation, that unconstitutional departure, by the Bureau of Internal Revenue, from said applicable principles, be corrected at the earliest possible moment so that the docket of this honorable Court be not flooded by applications for review of such illegal determinations. And more particularly the public interest would be served through the consideration by this Court of the question whether penalties against taxpayers are appropriated where there has been a bona fide and timely effort to make full and complete disclosure of all pertinent facts even though not in a technically formal manner.

II.

The taxpayer filed, as found by the Board, "complete income and excess-profits tax returns, Form 1120, for the taxable years" (R. 27) and also, the Board found, filed "information, returns, Form 1096, with the attached form 1099 listing the amounts of dividends over $300 paid to its stockholders, for the years in question" (R. 27). The Board found the further fact that "Petitioner's books and records, which gave some indication that more than 50 per cent of its stock was owned by less than five stockholders and disclosed that at least 80 per cent of its income was derived from interest, were at all times available to respondent and were actualy made available to respondent's agents during audit of the income tax returns for

the taxable years" (R. 27, 28). It is, therefore, contended that the taxpayer submitted to respondent the equivalent of Form 1120-H (personal holding company return) at least to the extent necessary to avoid the imposition of penalties for failure to file said Form 1120-H.

WHEREFORE, petitioner respectfully prays that a Writ of Certiorari be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Second Circuit, directing that court to certify and send to this Court, for its review and determination, on a day certain therein to be named, a full and complete transcript of the record and all proceedings in this case numbered and entitled on its docket "No. 147, *R. Simpson & Co.* v. *Commissioner of Internal Revenue*", and that said judgment of the United States Circuit Court of Appeals for the Second Circuit may be reversed by this Honorable Court, and that this petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

September 2nd, 1942.

(Sgd.) GERALD DONOVAN,
Counsel for Petitioner.

Of Counsel:
JAMES T. HEENEHAN,
FRANCIS F. STEVENS.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

The Opinions of the Courts Below.

The opinion of the United States Circuit Court of Appeals for the Second Circuit, October Term, 1941, Docket No. 147, was rendered on June 19, 1942. It is to be found on page 49 of the record herein; the case is reported in 128 Fed. (2d) (Adv.) 742.

The opinion of the United States Board of Tax Appeals, B. T. A. Docket No. 98208, was rendered on May 14, 1941. It is to be found on pages 28-30 of the record herein; the case is reported in 44 B. T. A. 498, No. 80.

II.

Jurisdiction.

1. The statutory provision believed to sustain jurisdiction is Section 240 of the Judicial Code as Amended by the Act of February 13, 1925 (C. 229 sec. 1, 43 Stat. 938).

2. The judgment sought to be reviewed was entered on July 6, 1942 (R. 50).

3. The proceeding in which review is sought was initiated in the United States Board of Tax Appeals. It involved the asserted liability of the petitioner for personal holding company taxes under Section 351 of the Revenue Acts of 1934 and 1936, respectively and the asserted liability of the petitioner for penalties for failure to file Form 1120-H (personal holding company return).

III.

Statement of the Case.

The facts are not in dispute. R. Simpson & Co., Inc., the petitioner herein, "was incorporated under the laws of New York on July 1, 1918. It was qualified to conduct a general pawnbroking and loan business upon pledgese of personal property, and was licensed to conduct such business by the Bureau of Licenses of New York City. Petitioner continued in corporate form a business that was established in 1824 (R. 26).

The business of the petitioner was conducted on a rather large scale. (See summary of petitioner's activities, for the taxable years involved, at page 26 of the Record.)

The petitioner maintains that it was and is entirely a business corporation in active operation. It has never conducted any business other than that of a pawnbroker. Nevertheless the respondent asserted deficiencies for alleged personal holding company surtax liability and, in addition, 25 per cent penalties for failure to file personal holding company returns. These amounts were summarized by the Board of Tax Appeals (R. 25) in the following manner:

Year	Deficiency	Penalty
1934	$19,563.02	$4,890.76
1935	29,355.07	7,338.77
1936	2,731.97	682.99

The full amount of the aforesaid asserted deficiencies and penalties is appealed herein.

IV.

Specification of Errors.

The United States Circuit Court of Appeals for the Second Circuit erred in the following respects:

1. In holding that petitioner, an active operating corporation, was subject to tax as a personal holding company. It is contended that respondent's attempt to collect such taxes from the petitioner is unconstitutional because in violation of the due process clause of the Fifth Article of Amendment to the Constitution.

2. In holding that petitioner, an active operating corporation, was subject to penalties for failure to file personal holding company returns. In addition to the contention of unconstitutionality, it is further contended that petitioner's disclosures to respondent constituted the equivalent of filing such returns.

3. In holding that Section 351 aforesaid entitled "Surtax on Personal Holding Companies" was intended by Congress to apply to corporations which in truth and in fact were not personal holding companies in any sense of the term.

V. Argument

Point I.

Reasonably construed the statute has no application to corporations like the Petitioner.

In support of this statement, the Petitioner is entitled to rely upon an old and well established rule of law, viz., that, if there is reasonable doubt of the legislative intention to impose the tax, then that doubt must be resolved in favor of the taxpayer.

Gould v. *Gould*, 245 U. S. 151, 153;

Smietanka v. *First Trust and Savings Bank*, 257 U. S. 602, 606;
Reinecke v. *Northern Trust Co.*, 278 U. S. 339, 348;
White v. *Aronson*, 302 U. S. 16, 20.

(1)

Prima facie the Petitioner's case is not one of those coming within the purview of the statute.

It is undisputed that the Petitioner is an *operating* company, engaged in good faith in the transaction of a legal business. Such a corporation does not come within the description of the tax contained in the heading of Section 351, namely, a "SURTAX ON PERSONAL HOLDING COMPANIES." A "holding company" is not an operating company. On the contrary, it is sharply differentiated from an operating company.

The term "holding company" is a familiar one. It is used to designate a corporation which has withdrawn from active business (if ever engaged in it), and whose activities are confined to holding the title to corporate stock or other property for convenience in manipulation. An excellent illustration is afforded by the Capital Stock Tax. That is a tax imposed upon the privilege of doing business in a corporate capacity (*Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 151). Where the corporation has been engaged in the transaction of business the tax has always been imposed. On the other hand, where the corporation was not engaged in business, but was being used merely in order to hold the title to property, it has been held not to be subject to the tax. There are many such cases in the books.

Zonne v. *Minneapolis Syndicate*, 220 U. S. 187, 190;
McCoach v. *Minehill, etc., Co.*, 228 U. S. 295, 303;
U. S. v. *Emery, Bird, Thayer Realty Co.*, 237 U. S. 28, 35;

Magruder v. *W. B. & A. Realty Corporation*, 120 F. (2d) 441, 444;
Lane Timber Co. v. *Hynson*, 4 F. (2d) 666, 667;
Eaton v. *Phoenix Securities Co.*, 22 F. (2d) 497, 498;
U. S. v. *Hotchkiss Redwood Co.*, 25 F. (2d) 958, 959.

The inactive corporations in the cases cited were undoubtedly "holding companies" and they are sometimes so described.

> "*It* (the corporation) *is a holding* company. It was organized as such in 1920 for the purpose of taking over and managing securities held by an operating company."
>
> *Automatic Fire Alarm Co.* v. *Bowers*, 51 F. (2d) 118. (Emphasis added.)

A typical case is *Zonne* v. *Minneapolis Syndicate*, (220 U. S. 187). The decision is correctly syllabized as follows:

> "A corporation the sole purpose whereof is to hold title to a single parcel of real estate subject to a long lease and, for convenience of the stockholders, to receive and distribute the rentals arising from such lease and proceeds of distribution of the land, and which has disqualified itself from doing any other business, is not a corporation doing business within the meaning of the corporation tax provision * * * and is not subject to the tax."

These cases are authority for the proposition that a "holding company" is never, *per se*, an operating company, since if it were an operating company it would be subject to capital stock tax, whereas the well settled law is that they are exempt from it. It may be that the same corporation, in addition to the active transaction of business, might also perform the functions of a "holding company," and that such a corporation would be subject to a tax on "holding companies" none the less that it also engaged in

ordinary business. It is enough to say that no such case is presented here. In addition to its business of pawnbroking the Petitioner had no business activities whatever.

(2)

The definition of the "personal holding company" given in Section 351 of the statute is in complete accord with the headline of the Section.

So far the argument has been based solely upon the description of the tax found in the headnote to Sec. 351. We pass now to the more detailed definition contained in a later part of the Section.

The interpretation that reconciles the headnote and body of Sec. 351 of the statute is that a corporation is not a "holding company" for the purposes of this surtax unless "at least 80 per centum of its gross income is derived from royalties, dividends, interest, annuities, and (except in the case of regular dealers in stock or securities) gains from the sale of stock or securities," etc.

The purpose of this enactment is in no doubt whatever. It is stated with the utmost clearness in the Report of the Ways and Means Committee of the House on the Revenue Bill of 1934:

> "Perhaps the most prevalent form of tax avoidance practiced by individuals with large incomes is the scheme of the 'incorporated pocketbook.' That is, an individual forms a corporation and exchanges for its stock his personal holdings in stock, bonds or other income—producing property. By this means the income from the property pays corporation tax, but no surtax is paid by the individual if the income is not distributed.
>
> "For instance, suppose a man has $1,000,000. annual income from taxable bonds. His tax under existing law will be $571,100. However, if he forms a holding company to take title to the bonds and to receive

> the income therefrom, the only tax paid will be a corporate tax of $137,500. as long as there is no distribution of dividends. Thus a tax saving of $433,600. has been effected." (Internal Revenue Bulletin for Feb. 27, 1939, No. 9, p. 23).

Here is a statement of the scope and purpose of the statute which must be accepted, both because it carries complete conviction, and because it comes from an official source. It establishes that the purpose of the enactment was to remedy an obvious case of tax avoidance. There is no pretense of such a thing in the case at bar. The Petitioner is an ordinary business corporation, transacting in good faith the business for which it was organized.

Congress—long hostile to false labelling—called this section a "SURTAX ON PERSONAL HOLDING COMPANIES." The Commissioner would have the body of the section apply to *operating* companies in some cases. It is not necessary to have such mislabelling. All antagonism and inconsistency are avoided if we accept the obvious explanation that Congress desired to surtax personal holding companies but was willing to allow even personal holding companies to escape if less than 80% of their income was of a holding company character. There was no intention of taxing strictly operating companies in any case.

That Congress meant what the heading said—"SURTAX ON PERSONAL HOLDING COMPANIES"—is further evidenced by the fact that the "gross income", the character of which may render a corporation liable to surtax is (with one exception) income accruing from the mere owning and holding of the stockholders' property as contrasted with the employment of corporate assets in an active business enterprise. That is true in the case of "royalties", "dividends", "interest" and "annuities". The case of "gains from the sale of stock or securities" presents somewhat different features but in no way affects the

general policy of the statute. That policy is clearly set forth in the report of the Ways and Means Committee already cited above (Page 10). It is to prevent the owner of income-producing property from avoiding a tax on that income.

(3)

"Interest" as used in the body of Section 351 does not include such income as a pawnbroker's earnings.

The "incorporated pocketbook" has always been a logical resting place for stocks and bonds. When Congress, seeking to curb the excessive use of this tax-avoiding device, employed the word "interest" in Section 351, it is natural to suppose that it meant the kind of interest incorporated pocketbooks would naturally be receiving. Ordinarily the incorporated pocketbook holds a debtor's promise to pay both principal and interest. This type of income—viz., the compensation paid by one man for the use of another man's money—was the income which Congress obviously wished to subject, in certain special cases, to surtax.

To make this "SURTAX ON PERSONAL HOLDING COMPANIES" apply to a pawnbroker, it is necessary to do two things:

(1) Assume that Congress when it said "interest" meant something much broader than the compensation one derives from the mere holding of the borrower's promise to pay;

(2) Assume that "interest" covers a pawnbroker's revenues *and the whole thereof.*

The assumption that a pawnbroker's so-called interest is the same sort of return Congress had in mind when it used "interest" is difficult in the light of the practical fact that a pawnbroker does not and never did hold the pledgor's promise to pay either interest or principal. If,

the pledgor for any reason or no reason decides not to pay either principal or so-called interest, he may not be sued. The pawnbroker's only remedy is to sell the pledged article pursuant to the provisions of the local governing statute. Construing the word "interest" very broadly, it might be applied to a pawnbroking transaction because, although the transaction is more akin to sale with the privilege of repurchasing at a higher price, the term interest has been used for centuries in respect of the excess paid by the pledgor over and above his "loan". If, however, so broad a construction would cause a conspicuously active operating corporation to be subjected to a "SURTAX ON PERSONAL HOLDING COMPANIES" it should not be adopted.

Even if a given construction of the language is within the strict letter of the statute, it will still not be adopted, where to do so would lead to absurd or unjust results or conflict with the obvious policy of the statute.

> "All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that the Legislature intended exception to its language, which would avoid results of this character. The reason of the law in such cases should prevail over its letter." (*U. S.* v. *Kirby*, 7 Wall. 482, 486, 487.)
>
> "It is better always to adhere to a plain common sense interpretation of the words of a statute than to apply to them refined and technical rules of grammatical construction. * * * If a literal interpretation of any part of it would operate unjustly, or be contrary to the evident meaning of the act taken as a whole, it should be rejected. There is no better way of discovering its true meaning, when expressions in it are rendered ambiguous by their connection with other clauses than by considering the

necessity for it, and the causes which induced its enactment." (*Heydenfeldt* v. *Daney Gold, etc. Co.*, 93 U. S. 634, 648.)

"It is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers. This has been often asserted, and the reports are full of cases illustrating its application." (*Holy Trinity Church* v. *U. S.*, 143 U. S. 457, 459.)

It cannot be said, however, in the case at bar that the language of the statute is such as to exclude absolutely any interpretation other than that for which the Respondent contends. The word in dispute is "interest." It has been defined as follows:

"Interest in its primary meaning is the payment for the use of money; more broadly, it may mean the return on investment in any form. In theoretical analysis it is generally taken to mean a 'pure' remuneration for the use of money, or yield on money capital; pure interest is deduced from nominal interest by elimination of all elements imputable to cost or effort of administration, to insecurity of payment of interest of principal, to prospective changes in the purchasing power of money and to amortization necessary to maintain the principal intact." (*Encyclopedia of the Social Sciences*, Vol. 8, p. 131.)

Certainly it is legitimate to give the word its "primary meaning" of a payment made *solely* for the use of money. Such a meaning precisely fits the case at bar. The uncontradicted testimony showed that R. Simpson & Co., Inc., averaged from 15% to 17% per annum on its pledges but that nearly a third of this was necessitated by special operating expenses peculiar to the pawnbroking business such as appraisals, auctioneering, accounting for surplus monies and complying with police regulations (R. 27). If only that part of its income truly representing payment

for the use of money were considered this taxpayer *even if a confessed holding company* could not be subject to this surtax because its income would not be 80% from interest.

As this meaning of the word "interest"—a payment made solely for the use of money—is at least as legitimate as any other that can be imagined, by what right does the Respondent reject it and adopt one less satisfactory? And what becomes of the rule that, where the language of a tax statute is open to reasonable doubt, the taxpayer is entitled to the benefit of it?

Point II.

As to the Petitioner's Liability for Penalties.

It should be kept clearly in mind that the penalty provisions of the statute (Revenue Act of 1934, Sec. 291) are not mandatory. It adds to the requirement that 25% be added to the amount of the tax for failure to file a return within the time specified the proviso, "except that when a return is filed after such time and it is shown that the failure to file it was due to a reasonable cause and not to willful neglect, no such addition shall be made to the tax".

The tax is thus truly mandatory only where the taxpayer never attempts to comply with the requirement. That is not true in this case. In addition to the ordinary income and excess profits return the Petitioner filed two information returns, and his books and records were at all times open to the Commissioner. There is no pretense of concealment, or attempt at concealment.

> Petitioner's books and records, which gave some indication that more than 50 percent. of its stock was owned by less than five stockholders and disclosed

that at least 80% of its income was derived from interest were at all times available to respondent and were actually made to respondent's agents during audit of the income tax returns for the taxable years." (R. pp. 27, 28).

There is thus no trace of bad faith or concealment in the case; and we are at a loss to see why the Petitioner has been so harshly dealt with. The Respondent has always had power to prepare a return for a taxpayer (Revised Statutes, Sec. 3176, as amended). Why did he not use it in this case? It is, of course, an ancient saw that ignorance of the law excuses no one; but no principal of law or equity, we venture to say, requires that the rule be given an extreme application in order to impose a penalty. The attitude of the courts has always been exactly the reverse. They impose penalties only in a plain case, and then with reluctance.

If the facts in the case at bar were the same as in *O'Sullivan Rubber Co.* v. *Commissioner*, 120 Fed. (2d) 845, 849—and we cannot deny a certain degree of similarity—the decision there would impede our argument, but with the very high degree of good faith and the accumulation of disclosures of all essential facts in the case at bar, we urge the applicability of the viewpoint so clearly and concisely expressed in the dissenting opinion in that case. Judge Hand said, among other things:

"In the absence of fraud no penalty is imposed upon an innocent taxpayer, however he may throw the Commissioner off the track; it falls only upon those who by failing to make any return at all have given him no lead which he can follow up. Given a lead and good faith it rests upon him to check the return. For this reason it seems to me that our decision is a triumph of letter over substance." (120 Fed. (2d) p. 849.)

Point III.

Sec. 351 of the Revenue Act, as construed by the Commissioner, violates the Fifth Amendment to the Constitution of the United States.

Though the power of Congress to lay taxes is not questioned, it is still true that,—"This court has recognized that a statute purporting to tax may be so arbitrary and capricious as to amount to confiscation and offend the Fifth Amendment." (*Nichols* v. *Coolidge*, 274 U. S. 531, 542.)

It needs no argument to show that a statute like the one under consideration might well be a convenience to the tax gatherer. An arbitrary definition is given to a "personal holding company", and a heavy surtax is imposed upon the entity described. No attempt is made to square the definition with reality. The entity in question may, or may not, come within the ordinary, obvious, and natural meaning of a "holding company". It is taxed in any event.

Such action cannot be justified on the mere plea of convenience. When constitutional rights are involved, the convenience of the tax gatherer ceases to have any importance. The point has received explicit attention.

Schlesinger v. *Wisconsin*, 270 U. S. 230, 240;
Hoeper v. *Tax Commission*, 284 U. S. 206, 217;
Heiner v. *Donnan*, 285 U. S. 312, 328.

In *Heiner* v. *Donnan* the statute considered attempted to create an irrebuttable presumption that transfers made by a decedent within two years of death were made "in contemplation of death", and consequently taxable. The Court said:

> "To sustain the validity of this irrebuttable presumption it is argued, with apparent conviction, that

> under the *prima facie* presumption originally in force there had been a loss of revenue, and decisions holding that particular gifts were not made in contemplation of death are cited. This is very near to saying that the individual, innocent of evasion, may be stripped of his constitutional rights in order to further a more thorough enforcement of the tax against the guilty—a new and startling doctrine, condemned by its mere statement." (285 U. S. p. 328).

The rights involved were held to be "superior to this supposed necessity" and the attempted legislation so arbitrary as to violate due process.

While the situation in the case at bar of course differs on the precise facts from that in the Donnan case, the attack on constitutional rights appears to be just as serious. Unlike the provisions in Sec. 102 of the statute, there is no reference to an intention on the part of the corporation "of preventing the imposition of the surtax upon its shareholders." Such a purpose may have been, as in the case at bar, entirely absent from the minds of those organizing any given corporation or managing its affairs.

Even more serious is the fact that the tax is imposed upon some *operating* corporations, and not upon others, although the conditions in the two cases may be practically identical. A heavy tax is imposed upon corporations provided that "at any time during the last half of the taxable year more than 50 per centum in value of its outstanding stock is owned, directly or indirectly, by or for not more than five individuals." On the other hand, if such stock is held by six, or more than six, individuals, the corporation escapes this surtax entirely. It would be hard to explain or sanction such an arbitrary distinction.

It is undoubtedly true that Congress has a broad power to classify objects for purposes of legislation; but it is

equally well settled that this power must be exercised fairly and reasonably.

Royster Guano Co. v. *Virginia*, 253 U. S. 412, 415:

> ("But the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.")

Gulf, etc., Ry. Co. v. *Ellis*, 165 U. S. 150, 155.
Louisville Gas Co. v. *Coleman*, 277 U. S. 32, 37.
Frost v. *Corporation Commission*, 278 U. S. 515, 522.

The present statute pays no attention to these constitutional requirements.

Thus it may be a reasonable classification to separate out all true holding companies for special taxation or, perhaps, even to define *all* corporations, both holding and operating, as "holding companies," and tax them as such, but to arbitrarily select *some* operating corporations, label them "holding corporations," and impose crushing taxation upon them, as such (which the Respondent herein claims is the proper application of the statute in question) is the clearest possible example of arbitrariness, unreasonableness and discrimination, against which the Fifth Article of Amendment to the Federal Constitution protects us.

Conclusion.

The petitioner has shown that the due process clause of the Fifth Amendment would be violated if Section 351 of the Revenue Acts of 1934 and 1936, respectively, were applied to classify it, an active operating corporation, as a holding company. The petitioner has shown that there is no equivalence to justify such a statute or such an application, for general pawnbroking and loan companies do not enjoy the privileges of personal holding companies

and our national Legislature never intended that they be taxed as such. The United States Circuit Court of Appeals for the Second Circuit failed to act upon the conflict between the attempted application of said Section 351 to this taxpayer and the well and firmly established rules of constitutional law referred to above; it failed to protect petitioner in its right to the benefit of those well established constitutional rules. Furthermore, taxpayer has shown that its ample and accurate disclosures made in good faith to respondent preclude penalty for failure to file a formal personal holding company return.

It is respectfully submitted that this case calls for the exercise by this honorable Court of its supervisory powers in order that the construction and application of the Federal tax law involved be definitely settled and the errors of the United States Circuit Court of Appeals for the Second Circuit be corrected and that to such end a Writ of Certiorari should be granted and the Court should review the determination of said Circuit Court of Appeals and reverse it.

September 2nd, 1942.

(Sgd.) GERALD DONOVAN,
Counsel for Petitioner.

Of Counsel:

JAMES T. HEENEHAN,
FRANCIS F. STEVENS.

APPENDIX.

Statutes Involved.

The Revenue Act of 1934 provides (48 Stat. 680, ch. 277, p. 729):

SURTAX ON PERSONAL HOLDING COMPANIES

SECTION 351. (a) Imposition of Tax.

There shall be levied, collected, and paid, for each taxable year, upon the undistributed adjusted net income of every personal holding company a surtax equal to the sum of the following:

(1) 30 per centum of the amount thereof not in excess of $100,000; plus

(2) 40 per centum of the amount thereof in excess of $100,000.

(b) DEFINITIONS—As used in this title—

(1) The term "personal holding company" means any corporation (other than a corporation exempt from taxation under section 101, and other than a bank or trust company incorporated under the laws of the United States or of any State or Territory, a substantial part of whose business is the receipt of deposits, and other than a life-insurance company or surety company) if—(A) at least 80 per centum of its gross income for the taxable year is derived from royalties, dividends, interest, annuities, and (except in the case of regular dealers in stock or securities) gains from the sale of stock or securities, and (B) at any time during the last half of the taxable year more than 50 per centum in value of its outstanding stock is owned, directly or indirectly, by or for not more than five individuals. For the purpose of determining the ownership of stock in a personal holding company—(C) stock owned, directly or indirectly, by a corporation, partnership, estate, or trust shall be considered as being owned proportionately by its

shareholders, partners, or beneficiaries; (D) an individual shall be considered as owning, to the exclusion of any other individual, the stock owned, directly or indirectly, by his family, and this rule shall be applied in such manner as to produce the smallest possible number of individuals owning, directly or indirectly, more than 50 per centum in value of the outstanding stock; and (E) the family of an individual shall include only his brothers and sisters (whether by the whole or half blood), spouse, ancestors, and lineal descendants.

(2) The term "undistributed adjusted net income" means the adjusted net income minus the sum of:

(A) 20 per centum of the excess of the adjusted net income over the amount of dividends received from personal holding companies which are allowable as a deduction for the purpose of the tax imposed by section 13 or 204;

(B) Amounts used or set aside to retire indebtedness incurred prior to January 1, 1934, if such amounts are reasonable with reference to the size and terms of such indebtedness; and

(C) Dividends paid during the taxable year.

(3) The term "adjusted net income" means the net income computed without the allowance of the dividend deduction otherwise allowable, but minus the sum of:

(A) Federal income, war-profits, and excess-profits taxes paid or accrued, but not including the tax imposed by this section;

(B) Contributions or gifts, not otherwise allowed as a deduction, to or for the use of donees described in section 23 (o) for the purposes therein specified; and

(C) Losses from sales or exchanges of capital assets which are disallowed as a deduction by section 117 (d).

(4) The terms used in this section shall have the same meaning as when used in Title I.

FAILURE TO FILE RETURN

SECTION 291. In case of any failure to make and file a return required by this title, within the time prescribed by law or prescribed by the Commissioner in pursuance of law, 25 per centum of the tax shall be added to the tax, except that when a return is filed after such time and it is shown that the failure to file it was due to reasonable cause and not due to willful neglect no such addition shall be made to the tax. The amount so added to any tax shall be collected at the same time and in the same manner and as a part of the tax unless the tax has been paid before the discovery of the neglect, in which case the amount so added shall be collected in the same manner as the tax. The amount added to the tax under this section shall be in lieu of the 25 per centum addition to the tax provided in section 3176 of the Revised Statutes, as amended.

The Revenue Act of 1936, so far as the questions at bar are concerned, is substantially similar.

IN THE

Supreme Court of the United States

OCTOBER TERM—1943

No. 1

R. SIMPSON & CO. INC.,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR PETITIONER

GERALD DONOVAN,
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FRANCIS F. STEVENS,
Of Counsel.

SUBJECT INDEX

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IN THE

Supreme Court of the United States,

OCTOBER TERM, 1943

No. 1

R. SIMPSON & CO. INC.,
Petitioner,
vs.
COMMISSIONER OF INTERNAL REVENUE.

BRIEF FOR PETITIONER

The Opinions of the Courts Below

The opinion of the United States Circuit Court of Appeals for the Second Circuit, October Term, 1941, Docket No. 147, was rendered on June 19, 1942. It is to be found on page 49 of the record herein; the case is reported in 128 Fed. (2d) 742.

The opinion of the United States Board of Tax Appeals, B. T. A. Docket No. 98208, was rendered on May 14, 1941. It is to be found on pages 28-30 of the record herein; the case is reported in 44 B. T. A. 498, No. 80.

Jurisdiction

1. The statutory provision believed to sustain jurisdiction is Section 240 of the Judicial Code as Amended by the Act of February 13, 1925 (C. 229 sec. 1, 43 Stat. 938).

2. The judgment sought to be reviewed was entered on July 6, 1942 (R. 50).

3. The proceeding in which review is sought was initiated in the United States Board of Tax Appeals. It involved: (1), asserted liability of the petitioner for personal holding company taxes under Section 351 of the Revenue Acts of 1934 and 1936, respectively, and (2) asserted liability of the petitioner for penalties for failure to file Form 1120-H (personal holding company return).

4. On November 9, 1942, this Honorable Court denied certiorari.

5. On June 7, 1943 a motion for rehearing was granted by this Honorable Court and the prior order denying certiorari vacated. The petition herein, for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit was granted, limited, however, to the second question involved (see paragraph "3" immediately *supra*)—i. e. the asserted liability of the petitioner for penalties for failure to file Form 1120-H (personal holding company return).

6. In its aforesaid order allowing certiorari, this Honorable Court requested counsel to discuss the question of the jurisdiction of this Court to grant a petition for rehearing in this case, comparing the case of *Helvering* v. *Northern Coal Co.*, 293 U. S. 191 (79 L. Ed. 281, 55 S. Ct. 3) and also Section 1140 of the Internal Revenue Code. Said Internal Revenue Code, section 1140 (formerly Sec. 1005, Revenue Act of 1926) reads, so far as pertinent hereto, as follows:

> "Sec. 1140. Date When Board Decision Becomes Final.
>
> The decision of the Board (of Tax Appeals) shall become final—
>
> * * * * *
>
> (b) Decision Affirmed or Petition for Review Dismissed—
>
> * * *

(2) Petition For Certiorari Denied.—Upon the denial of a petition for certiorari, if the decision of the Board has been affirmed or the petition for review dismissed by the Circuit Court of Appeals; or

(3) After Mandate of Supreme Court.—Upon the expiration of 30 days from the date of issuance of the mandate of the Supreme Court if such Court directs that the decision of the Board be affirmed or the petition for review dismissed.

* * *

(c) Definitions—As used in this section—

(2) Mandate.—The term 'mandate', in case a mandate has been recalled prior to the expiration of 30 days from the date of issuance thereof, means the final mandate."

Pre-existing Body of Law

A legislative act is, of course, always to be considered with reference to the pre-existing body of law, to which it is added and of which it is thenceforth to form a part.

The power to grant rehearings is inherent in appellate courts, including this Honorable Court.

Bronson v. *Schulten*, 104 U. S. 410, 26 L. Ed. 797.

("* * * It is a general rule of the law that all the judgments, decrees, or other orders of the courts, however conclusive in their character, are under the control of the court which pronounces them *during the term* at which they are rendered or entered of record, and they may then be set aside, vacated, modified, or annulled by that court. * * *".) (Emphasis supplied).

Accordingly, this Court has promulgated its Rule 33 reading as follows:

"A petition for rehearing may be filed with the clerk, in term time or in vacation, within twenty-five days after judgment is entered, *unless the time is*

shortened or enlarged by order of the court, or of a justice thereof when the court is not in session, and must be printed, briefly and distinctly state its grounds, and be supported by a certificate of counsel to the effect that it is presented in good faith and not for delay. Such a petition is not subject to oral argument, and will not be granted, unless a justice who concurred in the judgment desires it, and a majority of the court so determines." (Italics added.)

A petition for certiorari is not finally "denied" until the lapse of the period during which this Honorable Court permits a petition for rehearing (i. e., in the situation where, as in the cause at bar, motions for leave to file, out of time, petitions for rehearing are proper, until the *end of the term*).

Cf. *Ortiz* v. *Public Service Commission*, 108 F. (2d) 815 (1940; CCA-1).

(Circuit Judge Magruder, writing for an unanimous court, said: "'It is well settled that if a motion or petition for rehearing is made or presented in season and entertained by the court, the time limited for a writ of error or appeal does not begin to run until the motion or petition is disposed of. Until then the judgment or decrees does not take final effect for the purposes of the writ of error or appeal.' *Northern Pacific Railroad Co.* v. *Holmes*, 1894, 155 U. S. 137, 138, 15 S. Ct. 28, 29, 39 Led. 99; *Chicago Great Western Railroad Co.* v. *Basham*, 249 U. S. 164, 167, 39 S. Ct. 213, 63 L. Ed. 534; *Joplin Ice Co.* v. *United States*, 8 Cir. 1936, 87 F. (2d) 174, 175.")

If, on such rehearing, the Court (as in the cause at bar) vacates its order denying certiorari and grants review of course no petition for certiorari has been finally "denied".

Applicable Principles of Statutory Construction

It is an ancient maxim of the law that "interpretare et concordare legis legibus est optimus interpretandi modus", that is, to interpret, and (to do it in such a way as) to har-

monize laws with laws, is the best method of interpretation.

Stoughter's Case, 8 Coke 169a.

Hence arises the rule that, in case of any doubt or ambiguity, a statute is to be so construed as not only to be consistent with itself throughout its whole extent, but also to harmonize with the other laws relating to the same or kindred matters, forming a complete, consistent and intelligible system, and also *so as not to conflict with the general and established principles of the law, whether statutory or unwritten.*

United States v. *Babbitt*, 1 Black 55, 17 Led. 94; *Lowe* v. *Yolo County Water Co.*, 8 Cal. App. 167, 96 Pac. 379.

This is specifically true as to taxing statutes also: *Chicago M. & St. P. R. R. Co.* v. *United States*, 127 U. S. 406; *Landrum* v. *United States*, 118 U. S. 81.

Thus a statutory rule must be construed consistently with the whole system of *pleading and practice*, of which it forms a part.

McDougald v. *Dougherty*, 14 Ga. 674.

And, therefore, statutes are to be read in the light of the common law and construed with reference thereto and the common law must be allowed to stand unaltered as far as is consistent with a reasonable interpretation of the new law.

Arthur v. *Bokenham*, 11 Mod. 148.

("The general rule in the exposition of all acts of Parliament is this, that in all doubtful matters, and where the expression is in general terms, they are to receive such a construction as may be agreeable to the rules of the common law in cases of that nature; for statutes are not presumed to make any

alteration in the common law further or otherwise than the act does expressly declare; and therefore in all general matters the law presumes the act did not intend to make any alteration, for if the Parliament had had that design, they would have expressed it in the act.")

And again, if a statute makes use of a word or a phrase, the meaning of which is well known at common law, the word should be understood in the statute in the same sense in which it was understood at common law.

McCool v. *Smith*, 1 Black 459, 17 L. Ed. 218.

For example, although the descent and distribution of property is entirely governed by statute, yet the common law may be considered in construing the act.

Truelove v. *Truelove*, 172 Ind. 441, 86 N. E. 1018, 27 L.R.A. (N.S.) 220.

It is also true that, although the federal courts have no common-law jurisdiction, all their jurisdiction being conferred by the Constitution and the acts of Congress, yet in construing such statutes, the rules of interpretation furnished by the common law are the true guide and have been uniformly followed.

Rice v. *Railroad Co.*, 1 Black 358, 17 L. Ed. 147.

Where a word or phrase has a judicially settled meaning it will be presumed that Congress in using that word or phrase in an act, used it in that sense.

United States v. *Merriam*, 263 U. S. 179, 68 L. Ed. 240, 44 S. Ct. 69;
United States v. *Anderson*, 263 U. S. 179, 68 L. Ed. 240, 44 S. Ct. 69.

The legislature is not to be lightly presumed to have intended to reverse the policy of its predecessors or to intro-

duce a fundamental change in long-established principles of law.

Robinson's Case, 131 Mass. 376, 41 Am. Rep. 239;
Graham v. *Van Wyck*, 14 Barb. (N.Y.) 531.

(A statute authorizing married women to hold, convey, and devise real property the same as if sole, will not empower a married woman to convey to her husband, by deed, her dower rights in his real estate. The Supreme Court of New York, in making this decision, said that the legislature could not have intended "*so violent an innovation upon the existing law;*" the safer and more reasonable construction would restrict the right of a married woman to convey to persons other than her husband.)

It will be recalled that in case of doubt taxing statutes are construed most strongly against the taxing authority and in favor of the citizen.

Gould v. *Gould*, 245 U. S. 151;
Smietanka v. *First Tr. & Savgs. Bank*, 257 U. S. 602;
American La France Fire Engine Co. v. *Riordon*, 6 Fed. (2d) 964;
Empire Fuel Co. v. *Hays*, 295 Fed. 704;
Bankers Trust Co. v. *Bowers*, 295 Fed. 89;
U. S. v. *Thompson*, 189 F. 939;
Miller v. *Gearin*, 258 Fed. 225;
United States v. *Merriam*, 263 U. S. 179, 68 L. Ed. 240, 44 S. Ct. 69;
United States v. *Anderson*, 263 U. S. 179, 68 L. Ed. 240, 44 S. Ct. 69;
Bowers v. *New York & Albany Lighterage Co.*, 273 U. S. 346, 71 L. Ed. 676, 47 S. Ct. 389.

And, obviously, this strict rule of construction is especially applicable to statutes which impose penalties.

Augusta Com. Bank v. *Sandford*, 103 Fed. (2d) 98.

Construction of Internal Revenue Code Section 1140 With Reference to the Cause at Bar

In the light of this pre-existing body of law (discussed *supra*) to the effect that a petition for certiorari is not finally "denied" by this Honorable Court until the end of the term during which the petition is initially refused and bearing in mind the applicable principles of statutory construction, what effect, if any, does the existence of the provisions of Internal Revenue Code Section 1140 (set forth *supra*) and the decision in the case of *Helvering* v. *Northern Coal Co.* 293 U. S. 191 have on the jurisdiction of this Honorable Court to grant a petition for rehearing in this case?

Examining the provisions of said Internal Revenue Code Section 1140 set forth *supra*, it is seen that, while it provides that the decision of the Board of Tax Appeals shall become final upon the "denial" of a *petition for certiorari*, it does not, as it *does* in the case of issuance of a mandate by this Honorable Court, make an explicit definition and limitation of the prior rule as to effect of finality.

This is the distinction between the cause at bar and the case of *Helvering* v. *Northern Coal Co.*, 293 U. S. 191 (which the Court has requested us to compare)—for there it was said, as to a *mandate*, in the per curiam opinion, "In view of the authoritative and *explicit* requirement of the statute and of its application to these cases, the petitions for rehearing are severally denied" (Italics added).

In other words, the statute under examination was drafted in the light of the timehonored principle, adhered to by this Honorable Court (see *Bronson* v. *Schulten*, *supra*) that an order is not finally "denied" until the end of the term. In the case of a *mandate* the draftsman inserted, as this Court has pointed out in *Helvering* v. *Northern Coal Co.* *supra*, an "authoritative and explicit requirement" altering and limiting the effect of the rule, that a matter, being

within the breast of the Court, is not final until the end of the term, by the following provisions:

> "The decision of the Board shall become final—
>
> * * *
>
> (b) Decision Affirmed or Petition for Review Dismissed.—
>
> * * *
>
> (3) After Mandate of Supreme Court.—Upon the expiration of 30 days from the date of issuance of the mandate of the Supreme Court, if such Court directs that the decision of the Board be affirmed or the petition for review dismissed.
>
> (c) Decision Modified or Reversed.—
>
> (1) Upon Mandate of Supreme Court.—If the Supreme Court directs that the decision of the Board be modified or reversed, the decision of the Board rendered in accordance with the mandate of the Supreme Court shall become final upon the expiration of 30 days from the time it was rendered, unless within such 30 days either the Commissioner or the taxpayer has instituted proceedings to have such decision corrected to accord with the mandate, in which event the decision of the Board shall become final when so corrected."
>
> I. R. C. Sec. 1140.

But in the very same section (I. R. C. Sec. 1140) in which he placed this authoritative and explicit requirement" as to the finality of a mandate the draftsman made no definition and limitation as to the period during which a *petition for certiorari* was not finally "denied." It surely cannot be said that, under the circumstances, this was an oversight for the very mention of the restrictions upon the operation of the ordinary rule as to the finality of a *mandate* excludes a similar change as to the finality of a denial of a *petition for certiorari*, where the draftsman has attempted to impose no "authoritative and explicit requirement", or, indeed, any change at all, as to the latter—for, as was said in the

case of *Arthur* v. *Bokenham*, supra "if the Parliament had that design they would have expressed it in the act."

Hence we submit that, in the words of the opinion in *Graham* v. *Van Wyck*, supra, "the legislature could not have intended so violent an innovation upon the existing law" as to limit the time-honored rule as to the finality of this Honorable Court's refusal of certiorari without "authoritative and explicit requirement" therefor; that the "denial" of a petition for certiorari within the meaning of I. R. C. Sec. 1140 means a *final* denial; that there had been no such final denial when certiorari was granted on rehearing herein; and that this Honorable Court has jurisdiction to review the cause herein.

We are strengthened in this conviction by the dictum in *Sweet* v. *Commissioner of Internal Revenue*, 120 F. (2d) 77, 80, where Judge Magruder writing for a unanimous bench said:

> "We add this qualification because it might possibly be held that a petition for certiorari is not finally denied within the meaning of Section 1005 (a) (3) (of the Revenue Act of 1926, now I. R. C. Sec. 1140 (b) (2) without change) until the lapse of the brief stated period during which the Supreme Court by its rules, invites a petition for rehearing. Cf. Ortiz *v.* Public Service Commission, 1 Cir., 108 F. 2d. 815, 816 (discussed *supra*)."

Indeed it is not free from doubt that Congress could, even if it had so chosen (and we submit it has not), oust this Honorable Court from jurisdiction to grant an effective rehearing after an initial refusal of certiorari, for it has often been held that while Congress can prohibit a court from hearing a case at all, it cannot authorize such a court to hear a case and at the same time prevent the court from hearing it according to the supreme law of the land.

> See *United States* v. *Hodson*, 7 Cranch 31, 34;
> *Gordon* v. *United States*, 117 U. S. 697, 701-702, 704;

In re Debs, 158 U. S. 564, 594;
Kansas v. *Colorado*, 206 U. S. 46, 82;
United States v. *Evans*, 213 U. S. 297;
United States v. *Klein*, 13 Wall. 128, 146-147;
Ross v. *United States*, 8 App. D. C. 32, 37, 40;
Stephens v. *Cherokee Nation*, 174 U. S. 445, 478;
Muskrat v. *United States*, 219 U. S. 346, 362;
Keller v. *Potomac Electric Power Co.* 261 U. S. 428, 444;
Kilbourn v. *Thompson*, 103 U. S. 168, 190-191.

Statement of the Case

The facts are not in dispute. R. Simpson & Co., Inc., the petitioner herein, "was incorporated under the laws of New York on July 1, 1918. * * * It was qualified to conduct a general pawnbroking and loan business upon pledges of personal property, and was licensed to conduct such business by the Bureau of Licenses of New York City. Petitioner continued in corporate form a business that was established in 1824" (R. 26).

The business of the petitioner was conducted on a rather large scale (See summary of petitioner's activities, for the taxable years involved, at page 26 of the Record).

The petitioner maintains that it was and is entirely a business corporation in active operation. It has never conducted any business other than that of a pawnbroker. Nevertheless the respondent asserted deficiencies for alleged personal holding company surtax liability and, in addition, 25 per cent penalties for failure to file personal holding company returns. These amounts were summarized by the Board of Tax Appeals (R. 25) in the following manner:

Year	Deficiency	Penalty
1934	$19,563.02	$4,890.76
1935	29,355.07	7,338.77
1936	2,731.97	682.99

The full amount of the aforesaid asserted deficiencies and penalties was appealed herein, but, as has been seen, *supra*, the order granting certiorari limited the review to the asserted liability of the petitioner for penalties for failure to file Form 1120-H (personal holding company return).

Specification of Errors

The United States Circuit Court of Appeals for the Second Circuit erred in holding that petitioner, an active operating corporation, was subject to penalties for failure to file personal holding company returns. In addition to the contention of unconstitutionality (violation of the due process clause of the Fifth Article of Amendment to the Constitution), it is further contended that petitioner's disclosures to respondent constituted the equivalent of filing such returns.

ARGUMENT

Upon principle and authority no penalties should be imposed for failure, on the part of a taxpayer, to file a tax return, when Form 1120H is not actually filed, but Form 1120, Form 1096, and Form 1099 are filed and disclose all the facts upon which the Commissioner of Internal Revenue may ascertain the total income tax due. Such was the situation in the cause at bar.

The Board of Tax Appeals found that the petitioner, R. Simpson & Co., Inc., in good faith claimed in its returns that it was not a personal holding company:

> The Board found that Robert C. Simpson, who had been president of petitioner R. Simpson & Co. Inc. since 1932, "did not file personal holding company returns on behalf of petitioner for the taxable years because he thought petitioner was not a holding company within the meaning of section 351" (R. 28).

The Board further found that the returns, filed in due time, showed all the facts necessary for the respondent Commissioner to compute the taxes as a personal holding company obligation:

> "On or before the due dates petitioner filed its complete income and excess profits tax returns, Form 1120, for the taxable years" (R. 27). The Board further found that "Petitioner also filed information returns, Form 1096, with the attached Form 1099 listing the amounts of dividends over $300 paid to its stockholders, for the years in question. Petitioner's books and records, which gave some indication that more than 50 percent of its stock was owned by less than five stockholders and disclosed that at least 80 percent of its income was derived from interest, were at all times available to respondent and were actually made available to respondent's agents during audit of the income tax returns for the taxable years" (R. 27-28).

However, the incomes were returned on Form 1120, for taxing corporations not holding companies, instead of Form 1120H for taxing holding company corporations. In addition Form 1096 and Form 1099 were filed. The Commissioner (upheld by the Board and by the Second Circuit Court of Appeals) drew the legal conclusion that such returns were "no return" and, that hence, he was entitled to determine penalties of 25% for each of the three years involved (1934, 1935 and 1936) under Revenue Act of 1934, Section 291, reading as follows:

> "Sec. 291: Failure to File Return
>
> In case of any failure to make and file a return required by this title, within the time prescribed by law or prescribed by the Commissioner in pursuance of law, 25 per centum of the tax shall be added to the tax, * * *"

This Honorable Court has unanimously held that where one kind of income taxpayer (corporation) in good faith files a return on a form provided for another kind of tax-

payer (trustee) which return discloses (as in the cause at bar) the facts upon which the Commissioner may compute the income tax actually due from the taxpayer, the return filed is so much a return that it even starts the running of the time within which the Commissioner may assess the tax.

> *Germantown Trust Co.* v. *Com'r. of Int. Rev.*, 309 U. S. 304, 307, 310, 60 S. Ct. 566, 569 84 L. Ed. 770.
>
> (The pertinent language of this High Court and the cases cited, showing the principle to be long recognized are:
>
> "It cannot be said that the petitioner, whether treated as a corporation or not, made no return of the tax imposed by the statute. Its return may have been incomplete in that it failed to compute a tax, but this defect falls short of rendering it no return whatever. *Zellerbach Paper Co.* v. *Helvering*, 293 U. S. 172, 180, 55 S. Ct. 127, 130, 79 L. Ed. 264; *Commissioner* v. *Stetson & Ellison Co.* (3 Cir.), 43 F. 2d, 553; *United States* v. *Tillinghast* (1 Cir.), 69 F. 2d, 718; *Mabel Elevator Co.*, 2 B. T. A. 517; *Abraham Werbeloosky*, 8 B. T. A. 442, 446; *Estate of F. M. Stearns*, 16 B. T. A. 889; *J. R. Brewer*, 17 B. T. A. 704." See also *Denman* v. *Motter*, D. C. Kan. 1930, 44 F. 2d, 648, where no form was available and the return was made on plain paper.)

We submit that there is no difference in principle between this Honorable Court's *Germantown* decision and the cause at bar (where one of the class of income taxpayers asserted by the Commissioner to be a holding company filed, in good faith, returns on forms provided for companies not holding companies, which disclose, as they did, the facts necessary to compute the tax due from a holding company), and it was so held in the recent case of *Lane-Wells Co.* v. *Commissioner of Internal Revenue*, 134 F. 2d, 977 (1943) where, writing for a unanimous court, Judge Denman said, at page 979:

> "The Board attempts to distinguish the Germantown case on the ground that though both forms 1120

and 1120H are for income taxpayers under the income tax provisions of the Act of 1934, taxpayer used Form 1120 under a tax imposed on it under Title I of the Act, 26 U. S. C. A. Int. Rev. Acts, page 659 et seq. while taxpayer should have used Form 1120H under a tax imposed by Title 1A, 26 U. S. C. A. Int. Rev. Acts, page 757 et seq. The attempted distinction is that the tax under Title I is a 'separate and distinct tax' from the tax under Title 1A. The distinguishing is not sound. (Even in the Board, Member Van Fossan dissented on this particular ground, saying 43 B. T. A. 463, 470: "I believe this case is controlled by the decision of the Supreme Court in *Germantown Trust Co.* v. *Commissioner*, 309 U. S. 304.) In the Germantown case the fiduciary return on Form 1041 returns income which is for computing a separate and distinct tax either on the trustee or the beneficiary. The tax on either is as much a 'separate and distinct tax' from that on 'associations taxable as corporations' as are separate and distinct taxes on holding companies and companies not holding companies. Both are income taxes imposed by the same Act. The Act makes the statute of limitations (and the penalty for failure to file a return) applicable alike to all classes of returns.

The Treasury Department in 1934 attempted to forestall the rule of the Germantown case, established in 1940, by incorporating in the Regulations providing Form 1120H for holding companies a similar erroneous conclusion of law. This conclusion of law is stated in the Regulations as, 'However, since the surtax imposed under Title 1A is a distinct and separate tax from those imposed under Title I, the making of a return under Title I will not start that period of limitation for assessment of the surtax imposed under Title 1A.' Art. 351-8, Treasury Regulations 86, promulgated under the Revenue Act of 1934.

The respondent's contention is that, despite the holding of the Germantown case, the contrary construction of the law placed *in* a regulation makes the construction of law a *regulation* within the regulatory power of the Secretary of the Treasury. The statement of the proposition answers it. It is the function of the courts and not the Secretary to determine

the legal effect of his Regulations requiring the use of forms for different classes of taxpayers."

The position of the taxpayer in the cause at bar is even stronger than that of the successful taxpayer in the *Lane-Wells* case, for herein there were filed not only Form 1120 but also Forms 1096 and 1099.

Even in the Second Circuit (from which this appeal is taken) one of the most distinguished judges therein—Learned Hand—in the very case which is the only one cited by it in its *per curiam* opinion, in support of imposition of penalties in the case at bar—*O'Sullivan Rubber Co. v. Commissioner* (1941), 120 F. 2d, 845, 849 (a case also involving a 1935 tax year) dissented on this point saying:

> "I agree with my brothers as to all but the penalty; and as to that I also agree not to follow the reasoning in *Noteman* v. *Welch*, 1 Cir., 108 F. 2d 206 (cited by the Board, in support of the penalties in the case at bar, together with the Board decision in *Lane-Wells Co.*, the latter, as has been seen, *supra*, being subsequently overruled by unanimous decision of the Ninth Circuit) because a return is still a return, however misleading it may be. In the absence of fraud no penalty is imposed upon an innocent taxpayer, however he may throw the Commissioner off the track; it falls only upon those who by failing to make any return at all have given him no lead which he can follow up. Given a lead and good faith, it rested upon him to check the return.
>
> For this reason it seems to me that our decision is a triumph of letter over substance. It is true that 'the undistributed adjusted net income' defined by Section 351 (b) (2) and (3) is not the 'net income' used for the base of the normal tax; but it is computed from that income, and the tax is an income tax, and indeed even a 'surtax' *eo nomine*. I can see no reason in substance to distinguish an innocent mistake as to it and an individual's mistake as to his surtax, except that an individual puts both in one return.
>
> The justification for this is that Sec. 351 (c) makes applicable to this surtax all the administrative provi-

sions of Title I; and since that title requires a return, so must Title 1A. Therefore there must be two returns, as the Commissioner has ruled. I raise no doubt as to the propriety of his ruling; but the statute did not compel it. If he had merely added to the return required by Title I the questions necessary for Title IA, it would clearly have been a compliance with Section 351 (c); and certainly no penalty could have been then imposed. We are imposing one only because he has found it administratively convenient to make two bites to this particular cherry. The penalty was not meant for that; it was imposed to punish delinquents; those who either deliberately, or from indifference, made no effort at all to pay their taxes, not those who merely misunderstood duties which they tried to discharge. By recourse to what even grammatically is a bit of by no means an inexorable verbal reasoning we are perverting it from that purpose."

It is thus seen, on principle and authority, that no penalty should have been imposed on the petitioner herein, R. Simpson & Co., Inc. for failure to file a tax return (1120H), the petitioner having filed returns (1120, 1096 and 1099) from which the Commissioner of Internal Revenue was able to ascertain the total tax due.

CONCLUSION

Wherefore it is respectfully submitted that that portion of the judgment herein of the United States Circuit Court of Appeals for the Second Circuit, which imposes a tax penalty, should be reversed and that this petitioner should have such other and further relief in the premises as to this Honorable Court seems meet and just.

Respectfully submitted,

(Sgd.) GERALD DONOVAN,
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FRANCIS F. STEVENS,
Of Counsel.

No. 1.

IN THE

Supreme Court of the United States

October Term—1943

R. SIMPSON & CO. INC., *Petitioner*

v.

COMMISSIONER OF INTERNAL REVENUE.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

REPLY BRIEF FOR PETITIONER

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Supreme Court of the United States

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REPLY BRIEF FOR PETITIONER

CORRECTION OF RESPONDENT'S STATEMENTS OF FACT

The respondent, in his brief herein has, inadvertently, no doubt, made certain misstatements of the facts herein. In order that this Honorable Court may completely understand the circumstances at bar, we believe we should here point out these errors:

Page 4, Par. 1—"The *treasurer* of the company who executed its income tax returns"—should read "The *president* of the company who executed its income tax returns" (R. 28).

Page 4, Pars. 2 and 3—"The Commissioner *assessed* personal holding surtaxes for the years in question under Section 351 of the Revenue Acts of 1934 and 1936, and a 25% penalty for failure to file the personal holding company returns under Section 291 of the Revenue Acts of 1934 and 1936 and under Section 406 of the Revenue Act of 1935 (R. 8-16). The Board of Tax Appeals affirmed the deficiencies and penalties so *assessed* (R. 28-30, 31)".—Because of the vital importance of the fact of the petitioner's

good faith and financial responsibility herein, we believe that this Court should have no doubt that the situation at bar was *not* of the type where the Commissioner made or attempted to make a jeopardy or other assessment prior to judicial hearing of the controversy (R. 8-16, 28-30, 31).

BOTH SIDES MAINTAIN THAT THIS COURT HAS JURISDICTION HEREIN.

Both sides maintain that there is no impediment produced by Internal Revenue Code Section 1140 or other statute or by the decision in the case of *Helvering* v. *Northern Coal Co.*, 293 U. S. 191 (based on an authoritative and explicit limitation in another subsection (b(3)) of I. R. C. Sec. 1140, not present in the subsection (b(2)) applicable to the situation at bar) to the assumption by this Honorable Court of jurisdiction herein. The Commissioner agrees that this interpretation of the jurisdiction of this Court presents no hazard to the revenues.

Bearing in mind the rule which requires strict construction of statutes which impose penalties, the undisputed good faith of the petitioner herein, and the full revelation by it to the respondent of its gross income, in the Form 1120 returns which it filed, no penalty should have been imposed on the petitioner herein. The respondent has cited no decision of this Honorable Court enunciating a different governing principle and most of the board and lower Court cases which he cites are clearly inapplicable to the situation at bar.

It is, of course, hornbook law that statutes (including tax legislation) which impose penalties are to be strictly construed.

See *United States* v. *Yuginovich*, 256 U. S. 450.
Augusta Com. Bank v. *Sandford*, 103 Fed. 98.

This rule would seem to have particular application in a situation where, as in the case at bar, a drastic penalty is sought to be imposed on top of what is in intent and actuality a most severe penalty in itself—a personal holding company surtax.

The Board of Tax Appeals found (R. 28) and the Commissioner does not attempt to deny, that the petitioner honestly believed that it was not a personal holding company and so stated in its timely and proper regular corporation returns (Form 1120) for the taxable years in question.

The Board further found that the returns filed by the petitioner showed all the gross income necessary for the Commissioner to compute to the fullest extent any personal holding company taxes which he might feel were due from the petitioner. The Commissioner asserts at page 37 of his brief herein that "the returns actually filed would not enable him to compute the personal holding company surtax". But the only facts he is able to cite (see Respondent's brief, p. 37) in support of this claim do not show that the entire gross income, necessary for the calculation of the fullest amount of tax were not thus revealed to him, but that certain possible *deductions*, which would reduce the tax, might have existed! Even as to these he admits (p. 37 of his brief) that some of this information might be obtained from the balance sheets and reconciliation statements attached to the Forms 1120 filed by the petitioner. Surely the Commissioner cannot be heard to assert that drastic penalties should be imposed on a taxpayer because he may not have furnished facts which would *reduce* his tax.

We submit that, as held by the unanimous Ninth Circuit in *Lane-Wells Co.* v. *Commissioner* (1943) 134 F. (2d) 977, and as Judge LEARNED HAND of the Second Circuit, said, in his dissenting opinion, in the case of *O'Sullivan Rubber Co.* v. *Commissioner* (1941) 120 F. (2d) 845, 849, "the penalty was

not meant for that" (honest failure as in the case at bar to file a Form 1120H return in addition to a Form 1120) "it was imposed to punish delinquents; those who either deliberately, or from indifference, made no effort at all to pay their taxes, not those who merely misunderstood duties which they tried to discharge".

Respondent's Cases.

The respondent has cited no decision of this Honorable Court which lays down a different rule of law than the one contended for by the petitioner herein. Most of the Board and lower Court cases cited by the respondent are clearly inapplicable here. Some involve the element of bad faith (not found by the Board or even asserted by the Commissioner to be present in the case at bar);

Blenheim v. *Commissioner*, 125 F. (2d) 906

("the Commissioner sent numerous letters to the petitioner and to its representatives both in the United States and in Canada requesting that a normal tax return (Form 1120) be prepared and filed" and "received no response whatever to his numerous letters").

Beam v. *Hamilton*, 289 Fed. 9 (C. C. A. 6th).

("Two witnesses testified without dispute that plaintiff refused, under advice of his accountant, to sign the excess profits return prepared by the revenue officers.")

Updike v. *United States*, 8 F. (2d) 1913 (C. C. A. 8th).

("We cannot shut our eyes to the obvious fact that the Missouri Valley Elevator Company was dissolved with full knowledge on the part of its stock-

holders of this impending legislation and for the primary purpose of avoiding taxation thereunder.")

Others involved situations (unlike the one at bar) where no return of any sort were filed:

Scranton-Lackawanna T. Co. v. *Commissioner*, 80 F. (2d) 519 (C. C. A. 3d);

Edmonds v. *Commissioner*, 90 F. (2d) 14 (C. C. A. 9th);

Fidelity & Columbia T. Co. v. *Commissioner*, 90 F. (2d) 219 (C. C. A. 6th).

Still others involved cases where the return filed was not signed or verified:

Plunkett v. *Commissioner*, 118 F. (2d) 644 (C. C. A. 1st).

(This case, cited by the Commissioner, clearly recognizes that the penalty under Revenue Act 1934, Section 291 is not mandatory for the Court said "In order to escape the penalty petitioner must show reasonable cause for his failure to file a proper return.")

Uhl Estate Co. v. *Commissioner*, 116 F. (2d) 403.

(Even in this case of failure to file any sort of a *verified* return there was a dissent to imposition of the penalty, to judge saying, "Section 291 is a penal statute and should be strictly construed against the Government.")

Commissioner's cited case of *Girard Investment Co.* v. *Commissioner*, 122 F. (2d) 843 (C. C. A. 3d), is merely a dictum on the penalty point as a return was eventually filed and his case of *National Contracting Co.* v. *Commissioner*, 105 F. (2d) 488 (C. C. A. 8th) involved, unlike the case at bar, a failure to fully state gross income.

The 1936 Penalties.

Commissioner admits at page 45 of his brief herein that "Section 291 of the 1936 Act apparently permits relief from the penalty provisions for failure to file, as well as for tardy filing of returns if the same is 'due to reasonable cause and not due to willful neglect' " but states, at page 46 of his brief that the Board had determined that there was not reasonable cause. An examination of the finding of facts of the Board (R. 26-28) reveals no such finding and it is plain from its opinion that it felt it was bound to adhere to its view as expressed in the prior case of *Lane-Wells Co.*, 43 B. T. A. 463 (later unanimously overruled in *Lane-Wells Co.* v. *Commissioner*, 134 F. (2d) 977) that the penalty was mandatory. There is thus here no determination of fact by the Board that must be respected by this Honorable Court, but merely a conclusion of law which we respectfully submit is clearly erroneous.

Conclusion.

Wherefore it is respectfully submitted that that portion of the judgment, herein, of the United States Circuit Court of Appeals for the Second Circuit, which imposes a tax penalty, should be reversed, and that this petitioner should have such other and further relief in the premises as to this Honorable Court seems meet and just.

Respectfully submitted,

(Sgd.) GERALD DONOVAN,
Counsel for Petitioner.

FRANCIS F. STEVENS,
Of Counsel.

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CITATIONS

489683—42——1

In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 419

R. SIMPSON & CO., INC., PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 25–30) in this case is reported in 44 B. T. A. 498. The opinion of the Circuit Court of Appeals (R. 49) is reported in 128 F. (2d) 742.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered July 6, 1942 (R. 50). The petition for a writ of certiorari was filed on September 25, 1942. Jurisdiction is conferred on this Court under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether taxpayer is a personal holding company within the meaning of Section 351 (b) (1) of the Revenue Acts of 1934 and 1936 and therefore subject to the surtax imposed by paragraph (a) of that section.

2. If so, whether the statute violates the due process clause of the Fifth Amendment of the Constitution.

3. If taxpayer is a personal holding company, whether it is liable for a 25% penalty for failure to file a return on Form 1120–H as required by Article 351–8 of Treasury Regulations 86 and 94, promulgated under the Revenue Acts of 1934 and 1936.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set forth in the Appendix, *infra*, pp. 9–17.

STATEMENT

The facts as found by the Board of Tax Appeals are as follows (R. 26–28):

During the taxable years, 1934–1936, petitioner was actively engaged in the conduct of business with the general public in the operation of its pawn shops. It made loans of money on personal property consisting almost entirely of jewelry. During those years, more than 50% of its capital stock was owned by less than five stockholders, and more than 80% of its gross income was derived from interest (R. 27).

On or before the respective due dates taxpayer filed its complete income and excess profits tax returns on Form 1120 for each of the years. The question asked on each return, whether the reporting corporation was a personal holding company within the meaning of Section 351 of the applicable Revenue Acts, was answered in the negative. The form of return for each of the three years advised the taxpayer that if it was a personal holding company the filing of an additional return on Form 1120-H was required. Taxpayer also filed information returns, Form 1096, with the attached Form 1099 listing the amounts of dividends over $300 paid to its stockholders, for the years in question. Taxpayer's books and records, which gave some indication that more than 50% of its stock was owned by less than five stockholders and disclosed that at least 80% of its income was derived from interest, were at all times available to the Commissioner and were actually made available to the Commissioner's agents during audit of the income tax returns for the taxable years (R. 27-28).

Taxpayer did not file personal holding company returns, Form 1120-H, for the taxable years. Robert C. Simpson, who has been president of taxpayer since 1932 and was its treasurer from 1922 until 1932 and who executed its income-tax returns for the years in question, having personally prepared the returns for two of

the years, was aware of the provisions of Section 351 of the Revenue Acts of 1934 and 1936 and the requirements with respect to the filing of personal holding company returns. He did not file personal holding company returns on behalf of taxpayer for the taxable years because he thought taxpayer was not a personal holding company within the meaning of Section 351 (R. 28).

The Board concluded that (R. 28) during the years 1934, 1935, and 1936 the taxpayer was a personal holding company within the meaning of Section 351 of the applicable Revenue Acts, and approved the imposition of the statutory penalty for failure to file personal holding company returns (R. 30).

The court below affirmed the Board as to the first point, on the authority of *Noteman* v. *Welch*, 108 F. (2d) 206 (C. C. A. 1st); and as to the second, on the authority of *O'Sullivan Rubber Co.* v. *Commissioner*, 120 F. (2d) 845 (C. C. A. 2d) (R. 49).

ARGUMENT

1. The court below correctly decided that the petitioner was a "personal holding company" within the meaning of Section 351 of the Revenue Acts of 1934 and 1936. Since more than 80% of its income consisted of interest, and since more than 50% of its stock was owned by less than five persons, petitioner falls squarely within the statutory definition in Section 351 (b) (1). There are no decisions to the contrary. The decisions

relied upon by petitioner (Pet. 9–10) do not deal with these statutory provisions and thus have no application here.

Petitioner contends that the statute was intended to reach only "incorporated pocketbooks" and not operating companies such as itself. However, it has been uniformly held that the term "personal holding company" is not to be so restricted and that any corporation which complies with the carefully specified criteria in Section 351 (b) (1) is within the statute. *Noteman v. Welch*, 108 F. (2d) 206 (C. C. A. 1st); *Girard Inv. Co. v. Commissioner*, 122 F. (2d) 843 (C. C. A. 3d), certiorari denied, 314 U. S. 699; *Commissioner v. Affiliated Enterprises*, 123 F. (2d) 665 (C. C. A. 10th), certiorari denied, 315 U. S. 812. See also *O'Sullivan Rubber Co. v. Commissioner*, 120 F. (2d) 845 (C. C. A. 2d); *American Package Corp. v. Commissioner*, 125 F. (2d) 413 (C. C. A. 4th). Moreover, it is apparent that Congress realized that its definition would include some operating companies because it took pains specifically to exclude banks, insurance companies, and surety companies.

The argument that a pawnbroker's revenues are not "interest" within the meaning of the statute is based upon the highly technical distinction that a pawnbroker does not hold the pledgor's promise to pay. However, it is conceded (Pet. 14) that the term "interest" has been

applied for centuries to the pawnbroker's charge, and it appears that the taxpayer reported its receipts in its federal income tax returns as "interest on loans" (R. 26). Similar arguments have been rejected in *Noteman* v. *Welch* and *Girard Inv. Co.* v. *Commissioner, supra.*

2. The contention that the statute makes an arbitrary classification is without substance. The tax is upon undistributed income of corporations controlled by a small number of stockholders, where the great bulk of the income is derived from specified sources. Congress was focussing its attention upon corporations that might conveniently be used by its stockholders for avoidance of surtaxes, and the classification which it established was therefore entirely reasonable. The fact that the line is so drawn that some similar corporations will not be reached is constitutionally immaterial. *Klein* v. *Board of Supervisors,* 282 U. S. 19, 23; *Steward Machine Co.* v. *Davis,* 301 U. S. 548, 584. Cf. *West Coast Hotel Co.* v. *Parrish,* 300 U. S. 379, 400. Moreover, it is settled that Congress is not limited to conventional classifications in framing its tax laws (*Burk-Waggoner Assn.* v. *Hopkins,* 269 U. S. 110), and taxes upon special classes of income have been specifically sustained (*United States* v. *Hudson,* 299 U. S. 498). No court has even questioned the validity of the provisions here involved. Although the issue was raised in *Girard*

Ins. Co. v. Commissioner, supra, the court assumed the constitutionality of the statute without discussion. See also *Noteman v. Welch, supra,* and *Foley Securities Corp. v. Commissioner,* 106 F. (2d) 731 (C. C. A. 8th).

3. Petitioner complains of the 25% penalty which was imposed because of its failure to file a separate return on Form 1120–H, as prescribed by Article 351–8 of Regulations 86 and 94 (Appendix, *infra,* pp. 16–17); and it asserts that its failure to file the return involved no attempt at concealment, as evidenced by the facts which it revealed on other returns and by the facts which were available to the Commissioner from its books and records. However, the 25% penalty is mandatory where the taxpayer has not filed the return on Form 1120–H. *O'Sullivan Rubber Co. v. Commissioner,* 120 F. (2d) 845 (C. C. A. 2d) so holds, and there is no decision to the contrary. See also *Lone Pine Lawn Corp. v. Helvering,* 121 F. (2d) 935 (C. C. A. 2d); *Logan Coal & Timber Assn. v. Helvering,* 122 F. (2d) 848 (C. C. A. 3d); *Porto Rico Coal Co. v. Commissioner,* 126 F. (2d) 212 (C. C. A. 2d). See also *Noteman v. Welch, supra.* Cf. *Girard Inv. Co. v. Commissioner, supra.*

As the foregoing cases indicate, the question of reasonable cause for delinquency becomes pertinent only where the return in question is later filed by the taxpayer, which was never done in

this case. In any event, as pointed out by the Board (R. 30), taxpayer's failure to file the required return was due entirely to its erroneous impression that it was not a personal holding company. Such excuse cannot satisfy the requirement of reasonable cause which the statutory exceptions lays down.

CONCLUSION

The decision below is correct. There is no conflict. The petition should be denied.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.
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Assistant Attorney General.
SEWALL KEY,
J. LOUIS MONARCH,
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Special Assistants to the Attorney General.

OCTOBER 1942.

APPENDIX

Revenue Act of 1934, c. 277, 48 Stat. 680:

SEC. 53. TIME AND PLACE FOR FILING RETURNS.

(a) *Time for Filing.*—

(1) *General rule.*—Returns made on the basis of the calendar year shall be made on or before the 15th day of March following the close of the calendar year. Returns made on the basis of a fiscal year shall be made on or before the 15th day of the third month following the close of the fiscal year.

(2) *Extension of time.*—The Commissioner may grant a reasonable extension of time for filing returns, under such rules and regulations as he shall prescribe with the approval of the Secretary. Except in the case of taxpayers who are abroad, no such extension shall be for more than six months.

* * * * *

SEC. 54. RECORDS AND SPECIAL RETURNS.

(a) *By Taxpayer.*—Every person liable to any tax imposed by this title or for the collection thereof, shall keep such records, render under oath such statements, make such returns, and comply with such rules and regulations, as the Commissioner, with the approval of the Secretary, may from time to time prescribe.

* * * * *

SEC. 62. RULES AND REGULATIONS.

The Commissioner, with the approval of the Secretary, shall prescribe and publish all needful rules and regulations for the enforcement of this title.

* * * *

SEC. 291. FAILURE TO FILE RETURN.

In case of any failure to make and file a return required by this title, within the time prescribed by law or prescribed by the Commissioner in pursuance of law, 25 per centum of the tax shall be added to the tax, except that when a return is filed after such time and it is shown that the failure to file it was due to reasonable cause and not due to willful neglect no such addition shall be made to the tax. The amount so added to any tax shall be collected at the same time and in the same manner and as a part of the tax unless the tax has been paid before the discovery of the neglect, in which case the amount so added shall be collected in the same manner as the tax. The amount added to the tax under this section shall be in lieu of the 25 per centum addition to the tax provided in section 3176 of the Revised Statutes, as amended.

* * * * *

SEC. 351. SURTAX ON PERSONAL HOLDING COMPANIES.

(a) *Imposition of Tax.*—There shall be levied, collected, and paid, for each taxable year, upon the undistributed adjusted net income of every personal holding company a surtax equal to the sum of the following:

(1) 30 per centum of the amount thereof not in excess of $100,000; plus

(2) 40 per centum of the amount thereof in excess of $100,000.

(b) *Definitions.*—As used in this title—

(1) The term "personal holding company" means any corporation (other than a corporation exempt from taxation under section 101, and other than a bank or trust company incorporated under the laws of the United States or of any State or Territory, a substantial part of whose business is the

receipt of deposits, and other than a life-insurance company or surety company) if—(A) at least 80 per centum of its gross income for the taxable year is derived from royalties, dividends, interest, annuities, and (except in the case of regular dealers in stock or securities) gains from the sale of stock or securities, and (B) at any time during the last half of the taxable year more than 50 per centum in value of its outstanding stock is owned, directly or indirectly, by or for not more than five individuals. * * *

(c) *Administrative Provisions.*—All provisions of law (including penalties) applicable in respect of the taxes imposed by Title I of this Act, shall insofar as not inconsistent with this section, be applicable in respect of the tax imposed by this section, except that the provisions of section 131 of that title shall not be applicable.

* * * * *

Revenue Act of 1935, c. 829, 49 Stat. 1014:

SEC. 406. FAILURE TO FILE RETURNS.

In the case of a failure to make and file an internal-revenue tax return required by law, within the time prescribed by law or prescribed by the Commissioner in pursuance of law, if the last date so prescribed for filing the return is after the date of the enactment of this Act, if a 25 per centum addition to the tax is prescribed by existing law, then there shall be added to the tax, in lieu of such 25 per centum: 5 per centum if the failure is for not more than 30 days, with an additional 5 per centum for each additional 30 days or fraction thereof during which failure continues, not to exceed 25 per centum in the aggregate.

Revenue Act of 1936, c. 690, 49 Stat. 1648:

SEC. 291. FAILURE TO FILE RETURN.

In case of any failure to make and file return required by this title, within the time prescribed by law or prescribed by the Commissioner in pursuance of law, unless it is shown that such failure is due to reasonable cause and not due to willful neglect, there shall be added to the tax: 5 per centum if the failure is for not more than thirty days with an additional 5 per centum for each additional thirty days or fraction thereof during which such failure continues, not exceeding 25 per centum in the aggregate. The amount so added to any tax shall be collected at the same time and in the same manner and as a part of the tax unless the tax has been paid before the discovery of the neglect, in which case the amount so added shall be collected in the same manner as the tax. The amount added to the tax under this section shall be in lieu of the 25 per centum addition to the tax provided in section 3176 of the Revised Statutes, as amended.

* * * * *

SEC. 351. SURTAX ON PERSONAL HOLDING COMPANIES.

(a) *Imposition of Tax.*—There shall be levied, collected, and paid, for each taxable year (in addition to the taxes imposed by Title 1), upon the undistributed adjusted net income of every personal holding company a surtax equal to the sum of the following:

(1) 8 per centum of the amount thereof not in excess of $2,000; plus

(2) 18 per centum of the amount thereof in excess of $2,000 and not in excess of $100,000; plus

(3) 28 per centum of the amount thereof in excess of $100,000 and not in excess of $500,000; plus

(4) 38 per centum of the amount thereof in excess of $500,000 and not in excess of $1,000,000; plus

(5) 48 per centum of the amount thereof in excess of $1,000,000.

(b) [Contains the same definition as given in Section 351 (b) of the Revenue Act of 1934, *supra.*]

(c) [Contains the same statement as to administrative provisions as given in Section 351 (c) of the Revenue Act of 1934, *supra.*]

Treasury Regulations 86, promulgated under the Revenue Act of 1934:[4]

ART. 291–1. *Addition to the tax in case of failure to file return.*—In case of failure to make and file a return required by Title I within the prescribed time, 25 percent of the amount of the tax is added to the tax unless the return is later filed and failure to file the return within the prescribed time is shown to the satisfaction of the Commissioner to be due to reasonable cause and not to willful neglect. Two classes of delinquents are subject to this addition to the tax:

[4] Articles 291–1, 351–1, 351–2, 351–8 of Treasury Regulations 94, promulgated under the Revenue Act of 1936, contain provisions similar to the articles with the same numbers in Regulations 86. Art. 291–1 of Treasury Regulations 86 was amended by T. D. 4626, XV–1 Cum. Bull. 61, 76–77 (1936), but the only material change was with reference to the size of the penalty which was made to accord with the amendment in the Revenue Act of 1935, Sec. 406.

(*a*) Those who do not file returns and for whom returns are made by a collector or the Commissioner, and

(*b*) Those who file tardy returns and are unable to show reasonable cause for the delay.

A taxpayer who files a tardy return and wishes to avoid the addition to the tax must make an affirmative showing of all facts alleged as a reasonable cause for failure to file the return on time in the form of an affidavit which should be attached to the return. If such an affidavit is furnished with the return or upon the collector's demand, the collector, unless otherwise directed by the Commissioner, will forward the affidavit with the return, and, if the Commissioner determines that the delinquency was due to a reasonable cause and not to willful neglect, the 25 percent addition to the tax will not be assessed. If the taxpayer exercised ordinary business care and prudence and was nevertheless unable to file the return in the prescribed time, then the delay is due to reasonable cause.

If the 25 percent addition to the tax for delinquency in filing the return has been added, the amount so added shall be collected in the same manner as the tax.

* * * * *

ART. 351–1. *Surtax on personal holding companies.*—Section 351 of Title IA imposes an additional graduated income tax or surtax upon corporations classified as personal holding companies. Corporations so classified are exempt from the surtax on corporations improperly accumulating surplus imposed by section 102 of Title I, but are not exempt from the other taxes imposed by that title. Unlike the surtax im-

posed by section 102, the surtax imposed by section 351 applies to all personal holding companies defined as such in article 351–2 regardless of whether or not they were formed or availed of to accumulate gains and profits for the purpose of avoiding surtax upon shareholders.

ART. 351–2. *Classification of a personal holding company.*—A personal holding company is defined as any corporation (other than a corporation specifically exempt), first, 80 percent or more of whose gross income for the taxable year was derived from royalties, dividends, interest, annuities, and gains from the sale of stock or securities; and, second, more than 50 percent in value of whose outstanding stock was owned, directly or indirectly, at any time during the last half of the taxable year by or for not more than five individuals. The only corporations specifically exempt from this tax are as follows: (1) Corporations exempt from taxation under section 101 of Title I; (2) banks and trust companies (incorporated under the laws of the United States, or of any State or Territory), a substantial part of whose business is the receipt of deposits; (3) life insurance companies; and (4) surety companies.

It is the nature of the gross income and the ownership of the outstanding stock which determine the classification as a personal holding company, and the several conditions with respect to both must be satisfied to bring a corporation within the classification. Gross income must be determined for the entire taxable year and the ownership of the stock outstanding must be determined according to its ownership

at any time during the last half of the taxable year. Inasmuch as such circumstances can vary from year to year, a corporation may constitute a personal holding company for some years and not for other years. In that case, the surtax liability shall be determined under section 351 only for the years in which the corporation comes within the classification as a personal holding company, while the liability for surtax as to the other years will depend upon whether the corporation comes within the provisions of section 102 with respect to such years.

* * * * *

(3) *Interest.*—The term "interest" means any amounts received for the use of borrowed money which are includible in gross income under Title I.

* * * * *

ART. 351–8. *Return and payment of tax.*—A separate return is required for the surtax imposed under section 351. Such return shall be made on Form 1120H. In the case of a personal holding company which is a domestic corporation, the return is required to be made within the time prescribed in section 53 and in the case of a foreign corporation within the time prescribed in section 235. The tax shown by the corporation on its return must be paid in the case of a domestic corporation within the time prescribed in section 56 and in the case of a foreign corporation within the time prescribed in section 236. The same provisions of law relating to the period of limitation for assessment and collection which govern the taxes imposed by Title I also apply to the surtax imposed under Title IA. However, since the surtax im-

posed under Title IA is a distinct and separate tax from those imposed under Title I, the making of a return under Title I will not start the period of limitation for assessment of the surtax imposed under Title IA. If the corporation subject to section 351 fails to make a return, the tax may be assessed at any time. If the Commissioner finds a deficiency in respect of the tax imposed by section 351, he is required to follow the same procedure which applies to deficiencies in income tax under Title I. The penalties applicable to the income taxes imposed under Title I, as well as the provisions of Title I relating to interest and additions to the tax, also apply to the surtax imposed by section 351. The administrative provisions applicable to the surtax imposed by section 351 are not confined to those contained in Title I but embrace all administrative provisions of law which have any application to income taxes.

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In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 1

R. SIMPSON & CO., INC., PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 25–30) is reported in 44 B. T. A. 498. The opinion of the circuit court of appeals (R. 49) is reported in 128 F. 2d 742.

JURISDICTION

The judgment of the circuit court of appeals affirming the decision of the Board of Tax Appeals was entered July 6, 1942 (R. 50). Petition for writ of certiorari was filed September 25, 1942. The petition was denied November 9, 1942. June

1, 1943, the petitioner filed with the Court motion for leave to file petition for rehearing out of time, together with the petition for rehearing. June 7, 1943, the Court granted the motion for leave to file and the petition for rehearing. On the same date it vacated its order of November 9, 1942, and granted certiorari limited to the second reason relied upon in the petition for the writ (R. 51). Jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Does Section 1140 (b) (2) of the Internal Revenue Code deprive this Court of jurisdiction to grant a petition for rehearing of an order denying a petition for certiorari to review a judgment of the circuit court of appeals affirming a decision of the Board of Tax Appeals (now The Tax Court of the United States)?

2. Where a corporation is held liable for personal holding company surtaxes for the years 1934, 1935 and 1936 under Section 351 of the Revenue Acts of 1934 and 1936, and the corporation failed to file for the years in question personal holding company returns, is the corporation subject to the 25% penalty provided by Section 291 of the Revenue Act of 1934, by Section 406 of the Revenue Act of 1935 and by Section 291 of the Revenue Act of 1936?

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set out in the Appendix, *infra*, pp. 47–56.

STATEMENT

The facts as found by the Board of Tax Appeals are as follows:

The taxpayer is a corporation under the laws of the State of New York (R. 26). In the years 1934, 1935, and 1936 it was engaged in the pawnshop business, lending money on personal property. During the years in question more than 50% of its capital stock was owned by less than five stockholders and more than 80% of its gross income was derived from interest. (R. 27.) For the years in question it filed complete income and excess profits tax returns on Form 1120 of the Treasury Department. Each form contained a question whether the corporation was a personal holding company within the meaning of Section 351 of the applicable Revenue Act and advised that, if it were, an additional return on Form 1120H was required. The taxpayer answered this question in the negative. (R. 27.) The taxpayer also filed information returns on Forms 1096 and 1099 of the Treasury Department, listing the amounts of dividends over $300 paid to its stockholders for the years in question. The taxpayer's books and records gave some indication that more than 50% of its stock was owned by less than five stockholders and disclosed

that at least 80% of its income was derived from interest. These books and records were at all times available to the Commissioner and were actually made available to his agents during the audit of the taxpayer's income tax returns for the years in question. (R. 27–28.) The taxpayer did not file personal holding company returns on Form 1120H. The treasurer of the company, who executed its income tax returns, did not file the personal holding company returns because he thought the taxpayer was not a personal holding company within the meaning of Section 351. (R. 28.)

The Commissioner assessed personal holding company surtaxes for the years in question under Section 351 of the Revenue Acts of 1934 and 1936, and a 25% penalty for failure to file the personal holding company returns under Section 291 of the Revenue Acts of 1934 and 1936 and under Section 406 of the Revenue Act of 1935 (R. 8–16).

The Board of Tax Appeals affirmed the deficiencies and penalties so assessed (R. 28–30, 31). On petition for review, the Circuit Court of Appeals for the Second Circuit affirmed the decision of the Board (R. 49–50).

Petition for certiorari was denied by this Court November 9, 1942, but on motion by the taxpayer for leave to file petition for rehearing out of time, taxpayer's petition for rehearing was granted by the Court, June 7, 1943. The formal order denying certiorari was vacated and the petition for the writ granted, limited to the question of the pen-

alty assessments. The order also requested counsel to discuss the question of the jurisdiction of the Court to grant the petition for rehearing (R. 51).

SUMMARY OF ARGUMENT

I

The Government does not contest the jurisdiction of the Court to grant the petition for rehearing of its order denying the petition for certiorari. The answer to the question whether the Court had the power to grant the petition for rehearing depends upon the proper construction of Section 1140 (b) (2) of the Internal Revenue Code. That subsection provides that decisions of the Board of Tax Appeals shall become "final," where the circuit court of appeals has affirmed, upon "the denial of a petition for certiorari." *Helvering* v. *Northern Coal Co.*, 293 U. S. 191, apparently holds "final" to mean final in the sense that the decision of the Board may not thereafter be disturbed by the reviewing court. That case does not necessarily control here, however, since it dealt with another subsection of what is now Section 1140 which expressly limited to 30 days the period within which the Court might recall its mandate. Section 1140 provides no corresponding restriction as to orders denying certiorari. We suggest that "the denial of a petition for certiorari" may be construed so as to preserve to the Court its inherent power, during the same

term, to reconsider orders denying certiorari. So construed, the expression refers not to the action of the Court on certiorari in the first instance, but to its ultimate action during the same term.

II

The taxpayer is liable under Section 291 of the Revenue Acts of 1934 and 1936 and Section 406 of the Revenue Act of 1935 for the penalty assessed by the Commissioner for failure to file a personal holding company return on Treasury Department Form 1120H.

The Revenue Acts and authorized Treasury Department Regulations clearly required the filing of this return by the taxpayer. The taxpayer was not relieved of this duty by the circumstance that it did file Treasury Department Form 1120 for ordinary income and excess profits taxes, and Information Returns 1096 and 1099 disclosing its stockholders who received during the tax year dividends in excess of $300. These returns did not notify the Commissioner that the taxpayer was a personal holding company or enable him to compute the tax. At most, they gave him a "lead." But Congress has not deemed a "lead" a sufficient return. The plain fact is that the taxpayer was required to file two distinct returns, on Forms 1120 and 1120H, and instead filed only the one, on Form 1120.

By Section 291 of the Revenue Act of 1934, and by Section 406 of the Revenue Act of 1935, the

assessment of the penalty for failure to file the return was mandatory. By Section 291 of the Revenue Act of 1936, the penalty for failure to file the return was excused if due to reasonable cause and not to willful neglect. The Board of Tax Appeals held, however, that the taxpayer had not shown that its failure to file the return was due to reasonable cause. This finding is proper and should be affirmed by this Court.

ARGUMENT

I

The jurisdiction of the Court to grant the petition for rehearing

The Government does not contest the Court's jurisdiction to grant a rehearing of the former order denying the petition for certiorari.

Absent a statutory prohibition, the Court clearly has the power during the same term to reconsider denials of certiorari, even though the 25-day period for rehearing provided by Rule 33 has expired (*infra,* pp. 17–18). Whether the Court has such power in the instant case, either within or without the 25-day period, depends upon the construction to be given Section 1140 (b) (2) of the Internal Revenue Code, which provides:

> SEC. 1140. DATE WHEN BOARD DECISION BECOMES FINAL.
>
> The decision of the Board shall become final—
>
> * * * * *

(b) *Decision Affirmed or Petition for Review Dismissed.*—

* * * * *

(2) *Petition for Certiorari Denied.*—Upon the denial of a petition for certiorari, if the decision of the Board has been affirmed or the petition for review dismissed by the Circuit Court of Appeals; * * *

Subsection (b) (2) presents only one of a variety of situations which are dealt with in Section 1140 (Appendix, *infra*, pp. 47–49). Although the provisions of this section are somewhat detailed, it seems advisable to note them at the outset:

After Board decision.—Under subsection (a), the decision of the Board of Tax Appeals (now the Tax Court) becomes "final" upon the expiration of the period allowed for the filing of a petition for review with a circuit court of appeals (defined to include the Court of Appeals for the District of Columbia), if no petition has been filed.

After circuit court of appeals decision.—Where a timely petition for review is filed with a circuit court of appeals, significance attaches in three differing situations to the event of the expiration of the period allowed for filing a petition for certiorari with this Court, if none has been filed, or, if a petition is filed, to the event of the denial of certiorari. Where the circuit court of appeals dismisses the petition for review or affirms the

Board's decision, then upon the happening of either of the events referred to, the Board decision becomes final, under (b) (2), quoted above, and (b) (1). Where the circuit court of appeals modifies or reverses the Board's decision, and either of the events referred to has occurred, then the decision of the Board rendered upon the court's mandate [1] becomes final after thirty days, unless within that period the parties move to correct it, in which case the Board's decision becomes final when so corrected, under (c) (2), (1) and (2). And where the circuit court of appeals remands the case to the Board for a rehearing, and either of the mentioned events transpires, then the decision of the Board rendered on the rehearing becomes final in the same manner as though there had been no prior decision, under (d) (1) and (2). From the foregoing it will be seen that, while significance is attributed to the denial of certiorari in three specified situations, only where the decision of the Board has been affirmed by the circuit court of appeals does the denial of certiorari render the Board decision "final."

After Supreme Court decision.—If the decision of this Court directs that the Board's decision be affirmed or the petition for review dismissed,

[1] Section 1140 (c) (2) defines "mandate," in case a mandate has been recalled prior to the expiration of 30 days from the date of its issuance, to mean the final mandate.

then the Board's decision becomes final thirty days after the issuance of this Court's mandate, under (b) (3). (This was the situation dealt with in *Helvering* v. *Northern Coal Co.*, 293 U. S. 191, which we discuss *infra*, pp. 19–20.) If this Court modifies or reverses the Board's decision, then the Board's decision rendered in accord with this Court's mandate becomes final after 30 days (subject to the same correctional provision as in the case of mandates of a circuit court of appeals) under (c) (1). If this Court orders a rehearing by the Board, then the Board's decision upon the rehearing, as in the case of rehearings ordered by a circuit court of appeals, becomes final as though there had been no prior decision, under (d). With like effect, subsections (c) (2) (3) and (d) (3) deal with the situations where the circuit court of appeals reverses the Board or orders a rehearing, and this Court affirms the circuit court of appeals.

Section 1140 derives from Section 1005 of the Revenue Act of 1926, c. 27, 44 Stat. 9. Prior to the Revenue Act of 1924, the only administrative review of income and estate tax assessments was by the Committee on Appeals and Review in the Office of the Commissioner of Internal Revenue. A wholly independent review could be obtained by the taxpayer only by payment of the tax and suit for refund against the United States or the appropriate collector of internal revenue.

To afford the taxpayer a review by an impartial body in advance of payment, the Board of Tax Appeals was established by Section 900 of the Revenue Act of 1924.[2] Under that Act, however, the decisions of the Board never became final in the sense of setting at rest the controversy. No direct judicial review of the Board's decisions was provided. The Commissioner could not assess any part of an amount disallowed as a deficiency by the Board, but, without assessment, he was free to sue for the collection of the claimed deficiency; likewise, a taxpayer was free to sue for the recovery of amounts paid pursuant to a Board decision. See *Old Colony Tr. Co.* v. *Commissioner*, 279 U. S. 716, 721–722. Sections 1001 to 1004 of the Revenue Act of 1926 (Sections 1141–1142, Internal Revenue Code) changed this situation by providing for direct review of the Board's decision by a circuit court of appeals, and upon certiorari pursuant to Section 240 of the Judicial Code, as amended, by this Court. Concomitantly, as to cases which went to the Board, the Commissioner, with exceptions not now material, was prohibited from making assessment, other than a jeopardy assessment, or collecting by distraint or by court proceeding, except in accordance with a decision of the Board which had be-

[2] See H. Rep. No. 179, 68th Cong., 1st Sess., pp. 7–8 (1939–1 Cum. Bull. (Part 2) 241, 246); S. Rep. No. 398, 68th Cong., 1st Sess., pp. 8–9 (1939–1 Cum. Bull. (Part 2) 266, 271).

come "final" (Sec. 274 (a), (b), Revenue Act of 1926; Sec. 272, Internal Revenue Code). The running of the statute of limitations on assessment and collection was appropriately suspended during the period in which the Commissioner was forbidden to proceed (Sec. 277 (b), Revenue Act of 1926; Sec. 277, Internal Revenue Code). Taxpayer, on his part, was prohibited from suing for refund of taxes to which he was not entitled under a decision of the Board which had become "final" (Sec. 284, Revenue Act of 1926; Sec. 322, Internal Revenue Code). And for "final," as used in these and other sections, it was necessary to refer to Section 1005 of the Revenue Act of 1926—the present Section 1140 (Sec. 274 (h), Revenue Act of 1926; Sec. 272 (h), Internal Revenue Code). Thus, since 1926 the section providing the particular circumstances under which a decision of the Board becomes final has been enmeshed with other sections which specify the effect of that finality.

The reasons for such particularity as to the finality of the Board's decisions were set forth in substantially identical words in the House and Senate Committee Reports on the Revenue Bill of 1926 (H. Rep. No. 1, 69th Cong., 1st Sess., p. 21 (1939–1 Cum. Bull. (Part 2) 315, 329); S. Rep. No. 52, 69th Cong., 1st Sess., p. 38 (1939–1 Cum. Bull. (Part 2) 332, 360)). The House Report is as follows:

> *Court review—Finality of decisions.*—Section 916 [Section 1005 as enacted] prescribes the date on which a decision of the Board (whether or not appeal thereon is had) is to become final. Inasmuch as the statute of limitations upon assessments and suits for collection, both of which are suspended during review of the Commissioner's determination, commences to run upon the day upon which the Board's decision becomes final, and inasmuch as the power to make a jeopardy assessment terminates upon the commencement of proceedings to review a decision of the Board, it is of utmost importance that this time be specified as accurately as possible. In some instances in order to achieve this result the usual rules of law applicable in court procedure must be changed. For example, the power of the court of review to recall its mandate is made to expire 30 days from the date of issuance of the mandate.

It is evident, of course, that the final decision referred to in Section 1140 carries with it more than the degree of finality required for purposes of appellate review. Cf. *Rochester Tel. Corp.* v. *United States*, 307 U. S. 125; *A. F. of L.* v. *Labor Board*, 308 U. S. 401. It might have been thought that a middle course in the construction of this section would have been justified. This would have construed "final", as used in Section 1140, to mean that a Board decision became final upon the occurrence of the events specified in that sec-

tion only in the sense that the decision of a lower court would become final in similar circumstances. On this view, the reviewing courts would retain power to exercise the traditional corrective processes, and the Commissioner and the taxpayer, in unusual situations, would simply be required to make final settlement of their accounts in the light of any action which either might have taken subsequent to the previous action of the reviewing courts. Any such middle course seems to be foreclosed, however, by the decision of this Court in *Helvering* v. *Northern Coal Co., supra.* There it seems to have been held that "final," as used in Section 1140, means final in the sense that the Board decision may not thereafter be disturbed.

Consequently, unless the *Northern Coal* case were to be reexamined, the area of inquiry is limited to the meaning of "denial of a petition for certiorari", as used in subsection (b) (2). If this means that the Board decision becomes final upon the denial of certiorari in the first instance, the Court has lost jurisdiction of this case. But Congress did not undertake to define what should constitute the denial of a petition for certiorari, and since the matter relates exclusively to the practice of this Court, it would seem appropriate for the Court itself to determine when a petition is to be deemed denied. In the light of the Court's practice of reconsidering such petitions, and in harmony with the presumed purpose of Congress

to postpone collection of the taxes until all judicial remedies are exhausted, subsection (b) (2) may be properly construed to refer to the ultimate action of the Court on petition for certiorari rather than to its initial action. Such a construction would leave the Court free to conform the practice in Board cases to that followed generally, and to entertain petitions for reconsideration, or to vacate on its own motion a previous denial of certiorari, during the same Term. There is nothing in the statute to militate against this construction.

The policy underlying Section 1140.—The need for the particularity of Section 1005 of the Revenue Act of 1926 (the present Section 1140) is not entirely clear. The problem of the finality of judgments was by no means a new one and the courts over a long period had constructed a workable reconciliation of the competing interests favoring the repose of litigated issues, on the one hand, and the doing of complete justice, on the other. In any event, it seems clear that the framers of the 1926 Act fastened upon the certainty of the date upon which the Board's decision became final as the vital consideration, rather than upon haste in the final determination of cases coming before the Board. There was no disposition to limit a complete judicial review of Board decisions; indeed, the "chief change made by the Act of 1926 was the provision for direct judicial

review" (*Old Colony Tr. Co.* v. *Commissioner*, 279 U. S. at p. 722). It would seem significant that the time limits expressly stated in Section 1140 are applicable only after the particular court referred to, or the Board after court review, has decided the merits of the case. Thus, the 30-day limitation for recall of mandates, under (b) (3), and, by force of (e) (2), also under (c) (1), (2), and probably (d), can apply only where the court issuing the mandate has decided the case on review. The same is true of the 30-day limitation for the correction of a Board decision rendered upon the mandate of this Court or a circuit court of appeals, under (c) (1) and (c) (2). In contrast to these provisions, no express limitation is placed upon the period during which the Board may hold a case in the first instance; the power of the Board to reconsider and vacate its own decisions, at least prior to review; or the procedure before the Board on a rehearing.[3]

With respect to the denial of certiorari, likewise, no express limitation is provided barring reconsideration of the action taken by this Court in the first instance. The dominant policy of the 1926 Act—to provide certainty as to when Board decisions become final—need not be defeated by permitting a period for reconsideration, so long only as the date of finality of the Board decision

[3] It may also be noted that under Section 1001 (a) of the Revenue Act of 1926, the losing party before the Board was allowed *six* months within which to file a petition for review.

may still be ascertained with certainty. A just result and the incidents of a complete judicial review might well be thought to require that "denial" of certiorari be so construed as to permit of a period for reconsideration. In this light, the following further considerations would seem relevant to a proper construction of subsection (b) (2).

The practice of the Court.—We have referred to the practice of the Court generally in reconsidering orders denying certiorari. Supreme Court Rule 33, providing for petitions for rehearing within 25 days after judgment, or subsequently thereto on order of the Court, has been applied to petitions for rehearing of orders denying petitions for certiorari. *Colgate-Palmolive-Peet Co.* v. *United States,* Nos. 38 and 39, this Term, certiorari denied, May 24, 1943, rehearing and certiorari granted, June 14, 1943; *Sanitary Refrigerator Co.* v. *Winters,* certiorari denied, 278 U. S. 599, rehearing and certiorari granted, 278 U. S. 587; *Roberts Sash & Door Co.* v. *United States,* certiorari denied, 282 U. S. 838, rehearing and certiorari granted, 282 U. S. 829; *Group No. 1 Oil Corp.* v. *Bass,* certiorari denied, 282 U. S. 877, rehearing and certiorari granted, 282 U. S. 830; *Paramount Publix Corp.* v. *American Tri-Ergon Corp.,* certiorari denied, 293 U. S. 587, rehearing and certiorari granted, 293 U. S. 528; *Douglas* v. *Willcuts,* certiorari denied, 293 U. S. 626, rehear-

ing and certiorari granted, 295 U. S. 722. And *Query* v. *United States,* certiorari denied, 314 U. S. 685, order vacated and certiorari granted, 316 U. S. 653, is a case where the Court on its own motion reconsidered an order denying certiorari entered several months previously. See Robertson & Kirkham, *Jurisdiction of the Supreme Court of the United States,* p. 552.

Moreover, the following cases fall within the purview of subsection (b) (2): *Duquesne Steel Foundry Co.* v. *Burnet,* certiorari denied, 282 U. S. 878, rehearing and certiorari granted, 282 U. S. 830; *Neuberger* v. *Commissioner,* certiorari denied, 308 U. S. 623, rehearing and certiorari granted, 310 U. S. 655; *Crane-Johnson Co.* v. *Commissioner,* certiorari denied, 308 U. S. 627, rehearing and certiorari granted, 309 U. S. 692; *Helvering* v. *Cement Investors, Inc.,* certiorari denied, 315 U. S. 802, rehearing and certiorari granted, 315 U. S. 825; and *Helvering* v. *James Q. Newton Trust,* certiorari denied, 315 U. S. 803, rehearing and certiorari granted, 315 U. S. 825. These cases present a situation identical with that of the instant case—the Board's decision had been affirmed by the circuit court of appeals and a petition for certiorari was granted after once having been denied—except that the motions for reconsideration of the denial of the writ were filed within the 25-day period provided by Rule 33, and the question of the power of the Court to vacate its former order apparently was not

brought to the Court's attention. The instant case is the only one which we have discovered where a petition to reconsider a denial of certiorari to review the circuit court's affirmance of a Board decision was filed beyond the 25-day period.

In *Helvering* v. *Sprouse*, certiorari denied, 315 U. S. 810, rehearing denied, 315 U. S. 831, certiorari granted, 316 U. S. 656, the Court after denying the petition for certiorari and the petition for rehearing, later on its own motion vacated its former order of denial and granted the writ. In this case the circuit court of appeals had reversed or modified the decisions of the Board of Tax Appeals and therefore subsection (c) (2), and not subsection (b) (2), of the Internal Revenue Code was involved. The case is analogous, however, since (c) (2), like (b) (2), attaches significance to a denial of certiorari. Together with the cases cited in the preceding paragraph, it indicates the practice heretofore followed in respect to rehearings of orders denying certiorari, even where decisions of the Board of Tax Appeals are involved.

Helvering v. *Northern Coal Co., supra,* did not involve any of the subsections which deal with the effect of a denial of certiorari. That case involved Section 1005 (a) (4) of the Revenue Act of 1926 (now Section 1140 (b) (3), Internal Revenue Code), which provided that the Board's

decision should become final "upon the expiration of 30 days from the date of issuance of the mandate of the Supreme Court." In that case the circuit court of appeals had affirmed the decision of the Board of Tax Appeals and this Court, the Justices being evenly divided, had affirmed the circuit court of appeals and issued its mandate. Later in the same term of the Court, the Commissioner, by reason of an intervening decision of the Court, requested a rehearing arguing in support of the petition that in spite of the statute the Court still retained, according to its existing practices and inherent judicial powers, jurisdiction to vacate its judgment and mandate. The Court, however (p. 193), "in view of the authoritative and explicit requirement of the statute" denied the petition for rehearing. For the reasons already stated, it is believed that this decision does not necessarily control the present case. The subsection there involved specifically fixed "30 days from the date of issuance of the mandate of the Supreme Court" as the date on which the decision of the Board should become final. Thus the Court is specifically limited to thirty days in which it may reconsider its judgment and recall the mandate. Subsection (b) (2), however, contains no similar time limit for the reconsideration of orders denying certiorari. Accordingly, in such cases there is no statutory impediment to the view that the petition should not be deemed

denied so long as the Court retains authority over its order.

By way of analogy, attention is drawn to the interpretation given by this Court to statutes governing appellate jurisdiction. Judicial Code, Section 237, as amended, provides that under specified circumstances "a final judgment or decree in any suit in the highest courts of a state in which a decision in the suit could be had * * * may be reviewed by the Supreme Court upon appeal" (U. S. C. 1940 ed., Title 28, Sec. 344). The Act of February 13, 1925, c. 229, 43 Stat. 936, Section 8 (a) (U. S. C. 1940 ed., Title 28, Sec. 350) provides that no appeal or writ of certiorari shall be allowed or entertained unless application therefor be made within three months after the entry of the judgment or decree sought to be reviewed. Under these provisions, it is held that a judgment or decree, although final in form, is not subject to review or does not commence the running of the three months' period if a petition for rehearing or a motion for a new trial is seasonably filed and entertained. See *Chicago G. W. R. R. Co.* v. *Basham*, 249 U. S. 164, 167; *Citizens Bank* v. *Opperman*, 249 U. S. 448; *Ohio Pub. Service Co.* v. *Fritz*, 274 U. S. 12, 13; *United States* v. *Seminole Nation*, 299 U. S. 417, 421; *Texas & Pacific Railway Co.* v. *Murphy*, 111 U. S. 488, 489; *Northern Pacific Railroad* v. *Holmes*, 155 U. S. 137, 138; *United States* v. *Ellicott*, 223 U. S. 524, 539. For similar holdings under Sections 25 (a) and 39 (c) of the Bank-

ruptcy Act of July 1, 1898, c. 541, 30 Stat. 544, as amended (U. S. C. 1940 ed., Title 11, Secs. 48 (a) and 67 (c)), see *Wayne Gas Co.* v. *Owens Co.*, 300 U. S. 131; *Bowman* v. *Loperena*, 311 U. S. 262, 266; *Pfister* v. *Finance Corp.*, 317 U. S. 144, 149.

Other cases.—*Sweet* v. *Commissioner*, 120 F. 2d 77 (C. C. A. 1st), involved Section 1005 (a) (3) of the Revenue Act of 1926 (which was identical with Section 1140 (b) (2) of the Internal Revenue Code), although on the facts the case was quite different from the instant case. There the circuit court of appeals had affirmed an order of the Board and this Court had denied certiorari. At the following term, this Court rendered a decision in another case claimed to be contrary to the decision of the circuit court of appeals, and the taxpayer thereupon moved that court for leave to file a motion with the Board to review its former decision. In these circumstances, quite apart from the statute, the case had become final so far as this Court was concerned, since it is held that the Court has no jurisdiction to entertain petitions for reconsideration filed subsequent to the end of the term at which the judgment or order for which reconsideration is sought was entered (*Brooks* v. *Railroad Co.*, 102 U. S. 107; *Bushnell* v. *Crooke Min. & Smelting Co.*, 150 U. S. 82; *Art Metal Construction Co.* v. *United States*, 283 U. S. 863, 289 U. S. 706). In the *Sweet* case, the circuit court of appeals based its decision denying the taxpayer's motion on Section 1005 (a)

(3) of the Revenue Act of 1926, commenting (p. 79) that the subsection fitted "the case at bar like a glove." It is nevertheless interesting to notice that the circuit court of appeals was in doubt (p. 80) as to whether under the statute the Board's decision became final within the 25 days after the entry of the order denying certiorari, the court commenting that during that period "the Supreme Court by its rules, invites a petition for rehearing." But there is no reason to fix the expiration of the 25-day period, rather than the expiration of the term of the Court, as the time when the Court's order becomes final, since both by its rules and practice the Court allows rehearings on good cause shown at any time during the term.

There are several cases involving the Board's power to reconsider its decisions. *Burnet* v. *Lexington Ice & Coal Co.*, 62 F. 2d 906 (C. C. A. 4th), and *Griffiths* v. *Commissioner*, 50 F. 2d 782, 784 (C. C. A. 7th), presented situations where the Board's rules set no time limit for petitions for rehearing, and petitions for rehearing were filed within the statutory period for petition for review by the circuit court of appeals. It was held that the time for filing such petition for review by the circuit court of appeals did not expire until the Board had disposed of the motion for rehearing. Cf. *Denholm & McKay Co.* v. *Commissioner*, 132 F. 2d 243 (C. C. A. 1st); *Swall* v. *Commissioner*, 122 F. 2d 324 (C. C. A. 9th), certiorari denied, 314 U. S.

697; *La Floridienne J. Buttgenbach & Co.* v. *Commissioner*, 63 F. 2d 630 (C. C. A. 5th).[4]

Practical considerations.—If the statute be construed as we suggest, the consequence will be that a petition for certiorari will not be deemed denied, under subsection (b) (2), until the expiration of the term of this Court at which the petition is rejected in the first instance. There remains for consideration the question whether there are any reasons of policy particularly applicable to cases coming from the Board of Tax Appeals which militate against such an interpretation.

Income taxes must, by Internal Revenue Code, Section 275, be assessed within three years after the return is filed. But where the taxpayer asks reconsideration by the Board of the Commissioner's deficiency letter, the Commissioner is by Section 272 prohibited from making an assessment "until the decision of the Board has become

[4] In *Bankers Coal Co.* v. *Burnet*, 287 U. S. 308, 313, this Court assumed that the Board had power to grant rehearings and vacate its prior decisions. And see *John Thomas Smith* v. *Commissioner*, 42 B. T. A. 505, reversed on other grounds, 136 F. 2d 556 (C. C. A. 2d). In this case the Board recently asserted a power to vacate its earlier decision before the taking of an appeal and before the time for appeal had expired.

The Circuit Court of Appeals for the Second Circuit has suggested the possibility that the Board of Tax Appeals has authority to reopen a case decided more than ten years before (*Monjar* v. *Higgins*, 132 F. 2d 990, 994). The subsequent history of this case shows that a motion to reopen was thereupon filed with the Tax Court of the United States, Docket No. 47094. The motion was denied on May 11, 1943, and the case is now pending on appeal (*Hugh B. Monjar* v. *Commissioner* (C. C. A. 2d)).

final."[4] During this period, however, the statute of limitations on the making of assessments is suspended. Internal Revenue Code, Section 277.[5] (*Supra*, pp. 11–12.) Since notices of deficiency under Section 272 of the Code frequently cannot be mailed until considerable time after the taxpayer has filed his return, and a goodly portion of the statute of limitations has expired, there is undoubtedly considerable importance in fixing exactly the date when the Board's decision becomes final. The Commissioner needs to know when he is at liberty to make an assessment and when the statute of limitations again starts running. However, it should be noticed that Internal Revenue Code, Section 1140 (b) (2), here involved, applies only to those cases where the circuit court of appeals has affirmed a decision of the Board and a petition for certiorari is denied by the Supreme Court. We may assume a case where the Board has affirmed the Commissioner's determination of a deficiency and the taxpayer has appealed to the circuit court of appeals. Then, in spite of the provision of Section 272, *supra*, by the express provision of the Internal Revenue

[4] By Section 273 of the Internal Revenue Code, the Commissioner may make, in spite of this prohibition, a jeopardy assessment if "assessment or collection of a deficiency will be jeopardized by delay." After the decision of the Board is rendered, however, this assessment may be made only for the deficiency determined by the Board.

[5] Similar provisions are contained in the Internal Revenue Code in respect of estate and gift taxes. Sections 871, 872, 874, 875, 1012, 1013, 1016, and 1017.

Code, Section 1145,[7] the Commissioner may at once assess the deficiency "determined by the Board," unless the taxpayer files his bond "conditioned upon the payment of the deficiency as finally determined." This latter section seemingly reduces in some measure the importance of fixing a precise date for the time when on petition for certiorari the decision of the Board becomes final. In any event, the expiration of the term of this Court at which certiorari was denied in the first instance would likewise furnish a readily ascertainable date of finality, and Section 1145 does mitigate any hazard to the revenues consequent upon the delay of a few months. The Commissioner, if the taxpayer has not filed a bond, may proceed at once to assess and collect the tax or, if a bond has been filed, may have recourse to the bond. The latter may not, it is true, be a satisfactory substitute for the more summary method of assessment and collection provided by the statute. Suit on the bond may even be required. If because bond is not filed the tax is assessed and collected by the Commissioner, and the Board and the circuit court are finally reversed by this Court, then under the Internal Revenue Code, Section 322, a cretit or refund is due the taxpayer.[8]

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[7] This section is derived from the corresponding provision of Section 1001 (c), Revenue Act of 1926.

[8] The tax in the instant case was assessed on Nov. 27, 1942, and paid on Dec. 11, 1942. Thereupon a bonding company

On the other hand, if the Board has expunged a deficiency determined by the Commissioner, and the circuit court of appeals has affirmed, the Commissioner would be the party seeking certiorari from the Supreme Court. If the petition for certiorari is denied, the decision of the Board and the court stands and there is no deficiency to assess. The question whether the statute of limitations on making of assessments runs from the original denial of the petition for the writ or from the action of the Court on petition for rehearing is therefore entirely immaterial.

In either situation, if the petition for certiorari is granted, whether on the original petition, or on the petition for rehearing, then Internal Revenue Code, Section 1140 (b) (2) is no longer applicable and other subsections control the situation, depending upon whether the Court affirms, modifies or reverses the decision below or orders a rehearing.

Balancing the considerations, we believe that the previous practice of this Court in reconsidering denials of certiorari, in Section 1140 cases as well as in other cases, is salutary and in accordance with sound policy. While litigation should, of course, be brought to an end as speedily as possible, the interest of the parties in securing a

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was released from liability on an appeal bond. However, this administrative action presents no difficulties, for the Tax Court is authorized to take into account any payments made after the mailing of the deficiency notice. See Sec. 322 (d) of the Internal Revenue Code.

judgment in accord with the authoritative pronouncement of law by the court of last resort is of equal, if not of greater, importance. Rehearings on denials of petitions for certiorari are customarily granted only when there intervenes between the first denial of the writ either a conflict in the circuits or else a decision by this Court inconsistent with the order denying the petition for the writ. In such a situation, if the Court could not redetermine its former action on the petition, the result might well be that the petitioner would be bound by a judgment below contrary to the law declared and applied by the Court in the second case, arising after certiorari was first denied. This unfortunate result is avoided by the judicious application by the Court of its authority to grant rehearings. If possible, in appeals from the decisions of the Board of Tax Appeals, the parties should have the benefit of this practice. There is no danger that the finality of the Board's decision would be indefinitely suspended, since it is well settled that after the term of the Court has ended, its orders and judgments are final and not subject to be reopened.

II

The penalty for failure to file the personal holding company return was correctly assessed

The taxpayer is a "personal holding company" within the meaning of Section 351 of the Revenue Acts of 1934 and 1936 (Appendix, *infra*, pp. 50–51.

53). It filed no personal holding company return for 1934, 1935, or 1936, the years here involved. The question is whether, in consequence of this failure, it was properly subjected to the 25% penalty provided by Sections 291 of the Revenue Acts of 1934 and 1936 and Section 406 of the Revenue Act of 1935 (Appendix, *infra*, pp. 49–50, 52–53).

Prior to the Revenue Act of 1934, personal holding companies, as now, were subject to the regular corporation income taxes under Title I, but there was no express provision taxing them with respect to the excessive accumulation of profits. They were merely subjected, along with all other corporations, to the provisions (*e. g.* Section 104 of the Revenue Act of 1932) imposing an additional tax upon the accumulation of profits where there was present the purpose of avoiding surtaxes upon the shareholders.

Because of the ineffectiveness of these latter provisions in regard to personal holding companies, it was recommended by the House Ways and Means Committee that the Revenue Act of 1934 contain a separate provision for taxing such companies. In H. Rep. No. 704, 73d Cong., 2d Sess., p. 11 (1939–1 Cum. Bull. (Part 2) 554, 562), the following recommendation was made:

> Your committee, therefore, recommends that the present section 104 be divided into two parts, one dealing with the personal holding company and the other with all other corporations which accumulate unreasonable

> surpluses. The part dealing with personal holding companies is new, while the present law has been retained with a few modifications to reach the other companies. (See Secs. 102 and 103 of the bill.)

In S. Rep. No. 558, 73d Cong., 2d Sess., p. 13 (1939–1 Cum. Bull. (Part 2) 586, 596), the House discussion is quoted and this paragraph follows:

> In view of this situation, your committee has rewritten the section dealing with personal holding companies and has placed it in title IA, section 351, and it has been made plain that this is an additional graduated income tax, or surtax, on personal holding companies.

It is further said in this report (p. 15):

> The effect of this system is to provide for a tax which will be automatically levied upon the holding company without any necessity for proving a purpose of avoiding surtaxes.

Finally, it is said in the Conference Report (H. Conference Rep. No. 1385, 73d Cong., 2d Sess., p. 20 (1939–1 Cum. Bull. (Part 2) 627, 630, 631):

> Amendment No. 45 strikes out the provision in the House bill providing for a "tax on personal holding companies," and amendment No. 124 substitutes a surtax on personal holding companies for taxable years to which Title I applies. * * *
>
> * * * *The Senate amendment provides for a separate return for the purposes of this surtax on personal holding companies.* All provisions of law in respect of the taxes

> imposed by Title I are applicable to this *return*, except that the foreign-tax credit imposed by section 131 is not allowed. [Italics supplied.]

As finally accepted by Congress in 1934, this bill appears as:

> TITLE IA—ADDITIONAL INCOME TAXES
>
> SEC. 351. SURTAX ON PERSONAL HOLDING COMPANIES

Although the provisions imposing the personal holding company surtax were contained in Title IA, Congress provided that the same provisions for administering taxes imposed by Title I should also apply to taxes imposed by Title IA. Section 351 (c), Appendix, *infra*, p. 51, of Title IA refers to Title I for those provisions, as follows:

> All provisions of law (including penalties) applicable in respect of the taxes imposed by Title I of this Act, shall insofar as not inconsistent with this section, be applicable in respect of the tax imposed by this section, * * *

The very fact that Congress believed some reference to administrative provisions necessary strongly supports the view that the personal holding company tax is to be regarded as a levy wholly separate from the tax imposed by Title I. It is a special income tax, as was the tax involved in *United States* v. *Hudson*, 299 U. S. 498, but this classification does not prevent it from being a

wholly separate tax. The separation of the Title I and Title IA taxes results in separate deficiencies as defined by Section 271 of the Internal Revenue Code with the consequence that a deficiency notice for only one of the taxes does not confer jurisdiction on the Tax Court to review the liability for the other. Cf. *Will County Title Co.* v. *Commissioner*, 38 B. T. A. 1396; *Rowan Cotton Mills* v. *Commissioner*, 1 T. C. 865, pending on appeal C. C. A. 4th, No. 1578; *Lane-Wells Co.* v. *Commissioner*, 43 B. T. A. 463, 480.

The physical separation under a different title number made it necessary that the new tax be separately implemented by appropriate administrative provisions. This could have been accomplished by a repetition of the administrative provisions of Title I. Congress chose instead to make the latter applicable to Title IA by reference.

Referring to Title I, Section 54 (a), Appendix, *infra*, p. 49, states that every person liable to any tax imposed by this title (*i. e.*, Title IA for our purposes) shall make such returns and comply with such rules and regulations, as the Commissioner, with the approval of the Secretary, may from time to time prescribe. And by Section 62, Appendix, *infra*, p. 49, the Commissioner is directed to prescribe and publish "all needful rules and regulations for the enforcement of this title" (*i. e.*, Title IA for our purposes).

The result of making the Title I provisions applicable is plainly the same as though the admin-

istrative provisions had been repeated. The requirement of a return for Title IA taxes is therefore clear, and the Conference Report, previously referred to, makes it apparent that Congress understood that a separate return would be required.[9] Pursuant to this understanding the Treasury Regulations stated unequivocally:

> A separate return is required for the surtax imposed under section 351. Such return shall be made on Form 1120H.

See Regulations 86 and 94, Article 351–8 (Appendix, *infra*, pp. 54–55, 56). The validity of this requirement has been upheld in *Noteman* v. *Welch*, 108 F. 2d 206 (C. C. A. 1st); *O'Sullivan Rubber Co.* v. *Commissioner*, 120 F. 2d 845 (C. C. A. 2d); *Lone Pine Lawn Corp.* v. *Helvering*, 121 F. 2d 935 (C. C. A. 2d); *Logan Coal & Timber Ass'n* v. *Commissioner*, 122 F. 2d 848 (C. C. A. 3d); *Girard Inv. Co.* v. *Commissioner*, 122 F. 2d 843 (C. C. A. 3d), certiorari denied, 314 U. S. 699; *Porto Rico Coal Co.* v. *Commissioner*, 126 F. 2d 212 (C. C. A. 2d).

Also under Title I, Sections 291 of the Revenue Acts of 1934 and 1936, and Section 406 of the Revenue Act of 1935, impose penalties for failure to file the required returns. By force of Section 351 (c), these provisions likewise are applicable to the

[9] Moreover, Section 407 (f) of the Revenue Act of 1938, which is a part of Title IA, relating to personal holding companies, refers specifically to "failure to file the return under this title," thus recognizing the intent of Congress that a separate return should be made for personal holding companies. See also Internal Revenue Code, Section 506 (f).

personal holding company tax provided by that section. See Regulations 86 and 94, Articles 291–1, 351–8 (Appendix, *infra*, pp. 53–54, 55–56). The lower court decisions last cited have so held.

The taxpayer in this case filed no personal holding company return, either on Form 1120H (R. 28) or otherwise. It did file income- and excess-profits-tax returns on Form 1120 and also information returns on Forms 1096 and 1099 listing the amounts of dividends over $300 paid to its stockholders. The income- and excess-profits-tax returns apparently disclosed the total interest received in relation to gross income (R. 26). In addition, the taxpayer's books and records were made available to the Commissioner's agents; they gave some indication that more than 50 percent of the taxpayer's stock was owned by less than five persons and disclosed that at least 80 percent of its income was derived from interest (R. 27–28). See Section 351 of the Revenue Acts of 1934 and 1936, which defines a "personal holding company" in terms of the proportion of interest received and the number of stockholders during the last half of its taxable year.

It seems evident that the filing of the income- and excess-profits-tax return on Form 1120 and of the information returns on Forms 1096 and 1099 cannot be considered the equivalent of the filing of the personal holding company return on Form 1120H, even though the Commissioner's agents might by examination of the taxpayer's records have discovered that the taxpayer was a personal

holding company. The federal tax is self-assessed. Its successful administration depends upon the making of accurate and comprehensive returns, from which the agents of the Bureau of Internal Revenue may with reasonable dispatch determine whether the taxpayer has correctly made the assessment provided by law. To assure the making of such returns the Congress in all of the Revenue Acts from 1913 to the present date has imposed penalties for failure to file the returns required by the law, notwithstanding the inquisitorial powers of the Treasury to gain access to taxpayers' books. Section 291 of the Revenue Acts of 1934 and 1936 and Section 406 of the Revenue Act of 1935, involved in this case, are consonant with this prevailing purpose.

The penalty is incurred by the failure of the taxpayer to file the required return. Where there is such a failure, the undisclosed tax remains unknown until the efforts of Government officials bring it to light. The argument that the availability of the information to Government officials avoids the penalty leads to the incongruous result that the penalty can never be incurred except where the information as to the character of the taxpayer's activities and the items of its income is beyond the Government's reach. But in that case there would never be any occasion for the Government to claim the penalty, and thus the argument would completely nullify the penalty provision. If the argument is limited to an avoidance of the penalty where the taxpayer gives

the Government officials a "lead," the answer is that Congress was not satisfied with a "lead" but required the taxpayer to file a separate return and imposed the penalty for its omission.[10] The burden of making a return from which the tax may be calculated and assessed rests by law upon the taxpayer and not upon the Commissioner. It does not shift to the Commissioner merely because he may have grounds for suspicion that the taxpayer may be subject to an unreported tax and may through recourse to the taxpayer's records have been able to calculate the tax. So to shift the burden of report and assessment to the Commissioner would render the administration of the Act impossible.[11]

[10] The penalty is one of the civil sanctions designed to ensure a full and honest disclosure by the taxpayer. *Helvering* v. *Mitchell*, 303 U. S. 391, 399, 405.

[11] In the present case the return by the taxpayer of its income on Form 1120 did not indicate that the taxpayer was a personal holding company under the statute. While the income-tax returns apparently did show that 80% of taxpayer's income was derived from interest, they would not disclose that for the last half of the taxable year more than 50% in value of its outstanding stock was held by not more than five persons. Information returns on Forms 1096 and 1099 would disclose only the stockholders who received more than $300 in dividends during the entire calendar year. These returns in the aggregate would not necessarily convey the information that the taxpayer was a personal holding company, and we do not understand taxpayer to contend that they in fact did so.

Furthermore, the return on Form 1120 is filed with the collector of the district of the taxpayer, and the information returns are by directions on their face mailed to the Com-

Moreover, even assuming, *arguendo*, that the Commissioner was on notice that the taxpayer was a personal holding company, the returns actually filed would not enable him to compute the personal holding company surtax. A comparison of Forms 1120 and 1120H shows the different types of information required in the two cases. For example, certain taxes, contributions, and amounts used or set aside to retire indebtedness incurred prior to January 1, 1934, are not taken into account in determining the net taxable income on Form 1120, but may be taken as deductions against that income in determining the personal holding company surtax on Form 1120H. (See Section 351 (a) and (b).) Some of this information might possibly be ferreted out from the balance sheets and reconciliation statements attached to Form 1120, but it would not be broken down in the required manner. Such schedules are, of course, not prepared for the purpose of computing a personal holding company surtax.

It is true that it has been held that a return, though on a wrong form, which discloses the information by which the Commissioner is notified

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missioner of Internal Revenue, Sorting Division, in Washington, and are there filed with the returns of the individual stockholders and not with the returns of the corporation making the payments. Since these two types of returns are not brought together in one place, they do not, in any event, fairly put the Commissioner upon notice that the taxpayer is a personal holding company.

that the tax is due and can determine the tax, may satisfy the various statutes and regulations which require that a "return" be filed. But the distinction between a wrong form and a mere "lead" is one of substance. Thus the holding in *Germantown Trust Co. v. Commissioner*, 309 U. S. 304, that a wrong form satisfied the statute is inapposite. There a corporation which invested as trustee the funds of a large number of beneficiaries filed with the Commissioner a fiduciary return on Form 1041 instead of corporation income tax return on Form 1120. The Commissioner assessed a corporate income tax against the corporation under Section 1111 (a) (2) of the Revenue Act of 1932. This Court held that the trust return was a sufficient "return" under Section 275 (a) of the Revenue Act of 1932, requiring that the tax "shall be assessed within two years after the return was filed." In so holding the Court said (p. 308) that the fiduciary return on Form 1041 "contained all of the data from which a tax could be computed and assessed although it did not purport to state any amount due as tax." While the "return may have been incomplete in that it failed to compute a tax * * * this defect falls short of rendering it no return whatever" (p. 310). If, however, the return filed does not contain the data from which the tax may be computed, then it does not comply with the statutory requirement of a return. Thus, *Florsheim Bros. Co. v. United States*, 280 U. S. 453, held that a tentative return

of income, which contained only an estimate of the taxes due, although authorized by the Commissioner, was not a "return" sufficient to start the limitations of the statute running. The Court in that case said (p. 460):

> The burden of supplying by the return the information on which assessments were to be based was thus imposed upon the taxpayer. And, in providing that the period of limitation should begin on the date when the return was filed, rather than when it was due, the statute plainly manifested a purpose that the period was to commence only when the taxpayer had supplied this information in the prescribed manner.[12]

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[12] To the same effect see *John D. Alkire Inv. Co.* v. *Nicholas*, 114 F. 2d 607, 610 (C. C. A. 10th):

> "* * * a return which fails to comply in a substantial degree with the requirements of the statute in respect to disclosing the requisite information essential to the making of assessments does not suffice to start the period of limitation."

See also *National Contracting Co.* v. *Commissioner*, 105 F. 2d 488 (C. C. A. 8th), a similar case; *Paso Robles Mercantile Co.* v. *Commissioner*, 33 F. 2d 653 (C. C. A. 9th), certiorari denied, 280 U. S. 595; *United States* v. *National Tank and Export Co.*, 45 F. 2d 1005 (C. C. A. 5th), certiorari denied, 283 U. S. 839; *National Shirt Shops* v. *United States*, 57 F. 2d 925 (C. Cls.), certiorari denied, 287 U. S. 633 (returns not covering entire tax year); *Cem Securities Corp.* v. *Commissioner*, 72 F. 2d 295, 298 (C. C. A. 4th), certiorari denied, 293 U. S. 613 (corporation had taken over business of another corporation filing single return for both corporations instead of separate returns for each); *Commissioner* v. *Krein Chain Co.*, 72 F. 2d 424 (C. C. A. 6th) (individual corporation return insufficient when consolidated returns required).

Under these tests, it is manifest that the returns filed by the instant taxpayer cannot be considered the equivalent of the required returns on Form 1120H.

With the exception of the recent decision in *Lane-Wells Co.* v. *Commissioner,* 134 F. 2d 977 (C. C. A. 9th), No. 115, this Term, it has been uniformly held in the circuit courts of appeals that a taxpayer who fails to file a personal holding company return on Form 1120H, even though a corporation income-tax return on Form 1120 has been filed, is subject to the prescribed statutory penalties for failure to file a return. *Noteman* v. *Welch,* 108 F. 2d 206 (C. C. A. 1st); *O'Sullivan Rubber Co.* v. *Commissioner,* 120 F. 2d 845 (C. C. A. 2d); *Lone Pine Lawn Corp.* v. *Helvering,* 121 F. 2d 935 (C. C. A. 2d); *Logan Coal & Timber Ass'n* v. *Helvering,* 122 F. 2d 848 (C. C. A. 3d); *Girard Inv. Co.* v. *Commissioner,* 122 F. 2d 843 (C. C. A. 3d), certiorari denied, 314 U. S. 699; *Porto Rico Coal Co. v. Commissioner,* 126 F. 2d 212 (C. C. A. 2d). Cf. *Blenheim Co.* v. *Commissioner,* 125 F. 2d 906 (C. C. A. 4th), holding that the filing of the personal holding company return did not prevent the application of the statutory penalty for failure to file the ordinary corporation tax return on Form 1120.

The court in the *Lane-Wells* case, *supra,* relied mainly upon the decision of this Court in *Germantown Trust Co.* v. *Commissioner,* 309 U. S. 304. But, as we have seen, the decision in that case is

not applicable here. In the first place the return in that case contained all the data necessary for the assessment of the tax by the Commissionier. In the present case the return which was filed was insufficient to advise the Commissioner that any liability existed for the personal holding company tax. The disclosure of liability is one of the principal reasons for requiring a return and we submit that a purported return omitting such critical information is an insufficient compliance with the statute.

Secondly, the *Germantown Trust Co.* case did not involve the statute imposing penalties for failure to file the prescribed return but the statute of limitations on making assessments. The statute here involved is for the express purpose of requiring the taxpayer to file the return prescribed by the regulations. If this statute may be avoided by the filing of some other type of return, then the authority of the Commissioner to prescribe specific forms becomes nugatory. Further, in that case the Commissioner did not specifically prescribe that two returns be filed. The taxpayer filed a return containing all the data necessary for the assessment of the tax, but by mistake used a wrong form. In the instant case the Commissioner prescribed two separate returns, one for income and excess profits, and one for the personal holding company surtax. The filing of both forms was essential to a proper return of the tax liability. The Bureau of Internal Revenue is an

organization of great magnitude, handling the returns of millions of taxpayers. The administration of this vast business requires careful and detailed planning in order that the various types of taxes under its jurisdiction may properly be assessed. The organization of the Bureau is conditioned in advance on the filing by the taxpayer of separate forms of returns for separate types of taxes. Two such forms of returns were required in the instant case. Only one was filed. The Regulations of the Commissioner and of the Secretary were positively and clearly violated. This, it is submitted, is an entirely different matter from the mere filing of a wrong form of return, as was involved in the *Germantown Trust Co.* case.

In addition, it should be pointed out that in the *Germantown Trust Co.* case the taxes to be assessed were all assessable under Title I of the Revenue Act of 1932, whether under the trust provisions of Sections 161–162 or under the corporation tax provisions of Sections 13 and 1111 (a) (2). The personal holding company surtax under Section 351 of the 1934 and 1936 Acts is, however, an entirely separate tax under the separate Title IA of the Revenue Acts and is "in addition to the taxes imposed by Title I."[13] A return of the corporate income and excess-profits

[13] Revenue Act of 1936, c. 690, 49 Stat. 1648, Section 351 (a). See also S. Rep. No. 558, 73rd Cong., 2d Sess., p. 13 (1939–1 Cum. Bull. (Part 2) 586, 596), *supra*, p. 30.

tax under Title I cannot in any sense, therefore, be considered a return of the personal holding company surtax under Section 351 of Title IA, and for failure to file the latter return the taxpayer is clearly subject to the statutory penalties.

A similar situation was presented with respect to returns of income under Title I of the Revenue Acts of 1916 and of October 3, 1917, and returns of war excess profits under Section 201, Title II, of the Revenue Act of October 3, 1917. Section 212 of Title II of the 1917 Act, like Section 351 (c) of the Acts of 1934 and 1936, made applicable to the excess profits tax the administrative provisions of the income tax, and the Commissioner, as under the acts here involved, provided for separate returns for the two types of taxes. In *Beam* v. *Hamilton*, 289 Fed. 9 (C. C. A. 6th), it was held that the failure of the taxpayer to file the excess profits tax return, in spite of the fact that a return for the ordinary income tax was duly filed, subjected him to the statutory penalty for failure to file returns. The statement of the court in reference to the income and to the excess profits tax is equally applicable to the ordinary income and personal holding company taxes here involved. It said (p. 14):

> Not only was the excess profits tax a separate, distinct, and then novel source of revenue, but the statute and regulations, as we have above shown, in express and formal terms required separate and distinct returns thereof, and we think it clear that failure to make a separate return of

> excess profits tax is nonetheless a failure to make the return contemplated by the statute because of the mere fact that the computations on the excess profits return are to be carried onto Form 1040; the use of that form also is necessary to a complete report. By section 213 the Commissioner was undoubtedly given authority, with the approval of the Secretary of the Treasury, to require both returns.

This case was followed in *Updike* v. *United States*, 8 F. 2d 913 (C. C. A. 8th), certiorari denied, 271 U. S. 661; *McDonnell* v. *United States*, 59 F. 2d 295 (C. Cls.), certiorari denied, 287 U. S. 648; *Atterbury* v. *United States*, 59 F. 2d 300 (C. Cls.); *Commissioner* v. *National Land & Const. Co.* 70 F. 2d 349 (C. C. A. 6th).

The taxpayer in the instant case was required, then, to make a return for the personal holding company surtax on Form 1120H. It made no such return or any other return from which the Commissioner could calculate and assess the tax. For such failure, Sections 291 of the Revenue Acts of 1934 and 1936, respectively, and Section 406 of the Revenue Act of 1935, prescribed the penalty assessed in this case. In respect to the Acts of 1934 and 1935, the assessment of the penalty is clearly mandatory. Section 291 of the 1934 Act provided that "In case of any failure to make and file a return * * * 25 per centum of the tax shall be added to the tax." It is only when a return is filed tardily that the taxpayer may be relieved of the penalty by showing that the delay

was "due to reasonable cause and not due to willful neglect." Section 406 of the 1935 Act, changing the amount of the penalty for tardy filing, makes the mandatory feature of the statute if anything more certain. Without any conflict whatsoever, this has been the uniform holding in the circuit courts of appeals. *Scranton-Lackawanna T. Co.* v. *Commissioner,* 80 F. 2d 519 (C. C. A. 3d), certiorari denied, 297 U. S. 723; *Edmonds* v. *Commissioner,* 90 F. 2d 14 (C. C. A. 9th), certiorari denied, 302 U. S. 713; *Fidelity & Columbia T. Co.* v. *Commissioner,* 90 F. 2d 219 (C. C. A. 6th), certiorari denied, 302 U. S. 723; *National Contracting Co.* v. *Commissioner,* 105 F. 2d 488, 492 (C. C. A. 8th); *Uhl Estate Co.* v. *Commissioner,* 116 F. 2d 403 (C. C. A. 9th); *Plunkett* v. *Commissioner,* 118 F. 2d 644 (C. C. A. 1st); *O'Sullivan Rubber Co.* v. *Commissioner,* 120 F. 2d 845 (C. C. A. 2d); *Logan Coal & Timber Ass'n* v. *Helvering,* 122 F. 2d 848 (C. C. A. 3d); *Lone Pine Lawn Corp.* v. *Helvering,* 121 F. 2d 935 (C C. A. 2d); *Calafato* v. *Commissioner,* 124 F. 2d 187 (C. C. A. 3d).

Section 291 of the 1936 Act apparently permits relief from the penalty provisions for failure to file, as well as for tardy filing of returns, if the same is "due to reasonable cause and not due to willful neglect." In respect to that year, however, the Board of Tax Appeals held that the taxpayer had not shown the requisite reasonable cause. The personal holding company surtax law

had then been in effect for three years and the taxpayer had been advised through the corporation income tax forms filed by it of its duty to file the personal holding company return. Nothing made it impossible for the taxpayer to comply with this requirement. A full disclosure, accompanied if desired by a disclaimer of liability, would have avoided the penalty and preserved to the taxpayer every right to test the merits of its position. The mere fact that the taxpayer erroneously believed it was not a personal holding company could not be the "reasonable cause" necessary to excuse it from the statutory penalty. At the least, this determination of the Board, which heard all the testimony in the case, including that of the officer who made the tax return for the taxpayer corporation, is reasonable and for that reason should not be disturbed.

CONCLUSION

The judgment of the court below should be affirmed.

Respectfully submitted.

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APPENDIX

Internal Revenue Code:

SEC. 1140. DATE WHEN BOARD DECISION BECOMES FINAL.

The decision of the Board shall become final—

(a) *Petition for Review Not Filed on Time.*—Upon the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time; or

(b) *Decision Affirmed or Petition for Review Dismissed.*—

(1) *Petition for certiorari not filed on time.*—Upon the expiration of the time allowed for filing a petition for certiorari, if the decision of the Board has been affirmed or the petition for review dismissed by the Circuit Court of Appeals and no petition for certiorari has been duly filed; or

(2) *Petition for certiorari denied.*—Upon the denial of a petition for certiorari, if the decision of the Board has been affirmed or the petition for review dismissed by the Circuit Court of Appeals; or

(3) *After mandate of Supreme Court.*—Upon the expiration of 30 days from the date of issuance of the mandate of the Supreme Court, if such Court directs that the decision of the Board be affirmed or the petition for review dismissed.

(c) *Decision Modified or Reversed.*—

(1) *Upon mandate of Supreme Court.*—

If the Supreme Court directs that the decision of the Board be modified or reversed, the decision of the Board rendered in accordance with the mandate of the Supreme Court shall become final upon the expiration of 30 days from the time it was rendered, unless within such 30 days either the Commissioner or the taxpayer has instituted proceedings to have such decision corrected to accord with the mandate, in which event the decision of the Board shall become final when so corrected.

(2) *Upon mandate of the Circuit Court of Appeals.*—If the decision of the Board is modified or reversed by the Circuit Court of Appeals, and if (1) the time allowed for filing a petition for certiorari has expired and no such petition has been duly filed, or (2) the petition for certiorari has been denied, or (3) the decision of the Court has been affirmed by the Supreme Court, then the decision of the Board rendered in accordance with the mandate of the Circuit Court of Appeals shall become final on the expiration of 30 days from the time such decision of the Board was rendered, unless within such 30 days either the Commissioner or the taxpayer has instituted proceedings to have such decision corrected so that it will accord with the mandate, in which event the decision of the Board shall become final when so corrected.

(d) *Rehearing.*—If the Supreme Court orders a rehearing; or if the case is remanded by the Circuit Court of Appeals to the Board for a rehearing, and if (1) the time allowed for filing a petition for certiorari has expired, and no such petition has been duly filed, or (2) the petition for certiorari has been denied, or (3) the de-

cision of the Court has been affirmed by the Supreme Court, then the decision of the Board rendered upon such rehearing shall become final in the same manner as though no prior decision of the Board had been rendered.

(e) *Definitions.*—As used in this section—

(1) *Circuit Court of Appeals.*—The term "Circuit Court of Appeals" includes the United States Court of Appeals for the District of Columbia;

(2) *Mandate.*—The term "mandate," in case a mandate has been recalled prior to the expiration of 30 days from the date of issuance thereof, means the final mandate. (U. S. C. 1940 ed., Title 26, Sec. 1140.)

Revenue Act of 1934, c. 277, 48 Stat. 680:

SEC. 54. RECORDS AND SPECIAL RETURNS.

(a) *By Taxpayer.*—Every person liable to any tax imposed by this title or for the collection thereof, shall keep such records, render under oath such statements, make such returns, and comply with such rules and regulations, as the Commissioner, with the approval of the Secretary, may from time to time prescribe.

* * * * * *

SEC. 62. RULES AND REGULATIONS.

The Commissioner, with the approval of the Secretary, shall prescribe and publish all needful rules and regulations for the enforcement of this title.

* * * * * *

SEC. 291. FAILURE TO FILE RETURN.

In case of any failure to make and file a return required by this title, within the time prescribed by law or prescribed by the Commissioner in pursuance of law, 25 per centum of the tax shall be added to the tax,

except that when a return is filed after such time and it is shown that the failure to file it was due to reasonable cause and not due to willful neglect no such addition shall be made to the tax. The amount so added to any tax shall be collected at the same time and in the same manner and as a part of the tax unless the tax has been paid before the discovery of the neglect, in which case the amount so added shall be collected in the same manner as the tax. The amount added to the tax under this section shall be in lieu of the 25 per centum addition to the tax provided in section 3176 of the Revised Statutes, as amended.

* * * * *

SEC. 351. SURTAX ON PERSONAL HOLDING COMPANIES.

(a) *Imposition of Tax.*—There shall be levied, collected, and paid, for each taxable year, upon the undistributed adjusted net income of every personal holding company a surtax equal to the sum of the following:

* * * * *

(b) *Definitions.*—As used in this title—

(1) The term "personal holding company" means any corporation * * * if—(A) at least 80 per centum of its gross income for the taxable year is derived from royalties, dividends, interest, annuities, and (except in the case of regular dealers in stock or securities) gains from the sale of stock or securities, and (B) at any time during the last half of the taxable year more than 50 per centum in value of its outstanding stock is owned, directly or indirectly, by or for not more than five individuals. * * *

(2) The term "undistributed adjusted net income" means the adjusted net income minus the sum of:

(A) 20 per centum of the excess of the adjusted net income over the amount of dividends received from personal holding companies which are allowable as a deduction for the purposes of the tax imposed by section 13 or 204;

(B) Amounts used or set aside to retire indebtedness incurred prior to January 1, 1934, if such amounts are reasonable with reference to the size and terms of such indebtedness; and

(C) Dividends paid during the taxable year.

(3) The term "adjusted net income" means the net income computed without the allowance of the dividend deduction otherwise allowable, but minus the sum of:

(A) Federal income, war-profits, and excess-profits taxes paid or accrued, but not including the tax imposed by this section;

(B) Contributions or gifts, not otherwise allowed as a deduction, to or for the use of donees described in section 23 (o) for the purposes therein specified; and

(C) Losses from sales or exchanges of capital assets which are disallowed as a deduction by section 117 (d).

(4) The terms used in this section shall have the same meaning as when used in Title I.

(c) *Administrative Provisions.*—All provisions of law (including penalties) applicable in respect of the taxes imposed by Title I of this Act, shall insofar as not inconsistent with this section, be applicable in respect of the tax imposed by this section, except that the provisions of section 131 of that title shall not be applicable.

* * * * * *

Revenue Act of 1935, c. 829, 49 Stat. 1014:

SEC. 406. FAILURE TO FILE RETURNS.

In the case of a failure to make and file an internal-revenue tax return required by law, within the time prescribed by law or prescribed by the Commissioner in pursuance of law, if the last date so prescribed for filing the return is after the date of the enactment of this Act, if a 25 per centum addition to the tax is prescribed by existing law, then there shall be added to the tax, in lieu of such 25 per centum: 5 per centum if the failure is for not more than 30 days, with an additional 5 per centum for each additional 30 days or fraction thereof during which failure continues, not to exceed 25 per centum in the aggregate.

Revenue Act of 1936, c. 690, 49 Stat. 1648:

SEC. 291. FAILURE TO FILE RETURN.

In case of any failure to make and file return required by this title, within the time prescribed by law or prescribed by the Commissioner in pursuance of law, unless it is shown that such failure is due to reasonable cause and not due to willful neglect, there shall be added to the tax 5 per centum if the failure is for not more than thirty days with an additional 5 per centum for each additional thirty days or fraction thereof during which such failure continues, not exceeding 25 per centum in the aggregate. The amount so added to any tax shall be collected at the same time and in the same manner and as a part of the tax unless the tax has been paid before the discovery of the neglect, in which case the amount so added shall be collected in the same manner as the tax. The amount added to the tax under this section shall

be in lieu of the 25 per centum addition to the tax provided in section 3176 of the Revised Statutes, as amended.

Sections 54 (a) and 62 of the Revenue Act of 1936 are identical with the same numbered sections of the Revenue Act of 1934; and Section 351 is, as far as the question presented in this case is concerned, substantially identical with Section 351 of the Revenue Act of 1934.

Treasury Regulations 86, promulgated under the Revenue Act of 1934:

> Art. 291-1. *Addition to the tax in case of failure to file return.*—In case of failure to make and file a return required by Title I within the prescribed time, 25 percent of the amount of the tax is added to the tax unless the return is later filed and failure to file the return within the prescribed time is shown to the satisfaction of the Commissioner to be due to reasonable cause and not to willful neglect. Two classes of delinquents are subject to this addition to the tax:
>
> (*a*) Those who do not file returns and for whom returns are made by a collector or the Commissioner, and
>
> (*b*) Those who file tardy returns and are unable to show reasonable cause for the delay.
>
> A taxpayer who files a tardy return and wishes to avoid the addition to the tax must make an affirmative showing of all facts alleged as a reasonable cause for failure to file the return on time in the form of an affidavit which should be attached to the return. If such an affidavit is furnished with the return or upon the collector's demand, the collector, unless otherwise di-

rected by the Commissioner, will forward the affidavit with the return, and, if the Commissioner determines that the delinquency was due to a reasonable cause and not to willful neglect, the 25 percent addition to the tax will not be assessed. If the taxpayer exercised ordinary business care and prudence and was nevertheless unable to file the return in the prescribed time, then the delay is due to reasonable cause.

If the 25 percent addition to the tax for delinquency in filing the return has been added, the amount so added shall be collected in the same manner as the tax.

* * * * *

This article was amended by T. D. 4626, XV–1 Cum. Bull. 61, 76–77 (1936), to conform with the changes in the amount of the penalty for tardy returns prescribed by Section 405 of the Revenue Act of 1935. Since no personal holding company return was filed at all by the taxpayer in this case, the amendments are immaterial to the question here presented.

Art. 351–1. *Surtax on personal holding companies.*—Section 351 of Title IA imposes an additional graduated income tax or surtax upon corporations classified as personal holding companies. * * *

* * * * *

Art. 351–8. *Return and payment of tax.*—A separate return is required for the surtax imposed under section 351. Such return shall be made on Form 1120H. * * * The penalties applicable to the income taxes imposed under Title I, as well as the provisions of Title I relating to interest and additions to the tax, also apply to the surtax imposed by section 351. The administrative provisions applicable

to the surtax imposed by section 351 are not confined to those contained in Title I but embrace all administrative provisions of law which have any application to income taxes.

Treasury Regulations 94, promulgated under the Revenue Act of 1936:

Art. 291–1 (as amended by T. D. 5058, 1941–2 Cum. Bull. 156). *Addition to the tax in case of failure to file return.*—In case of failure to make and file a return required by Title I within the prescribed time, a certain percent of the amount of the tax is added to the tax unless failure to file the return within the prescribed time is shown to the satisfaction of the Commissioner to be due to reasonable cause and not to willful neglect. The amount to be added to the tax is 5 percent if the failure is for not more than 30 days, with an additional 5 percent for each additional 30 days or fraction thereof during which failure continues, not to exceed 25 percent in the aggregate.

A taxpayer who wishes to avoid the addition to the tax for delinquency must make an affirmative showing of all facts alleged as a reasonable cause for failure to file the return on time in the form of an affidavit which should be filed with the collector, who, unless otherwise directed by the Commissioner, will forward the affidavit to the Commissioner, and, if the Commissioner determines that the delinquency was due to a reasonable cause, and not to willful neglect, the addition to the tax will not be assessed. If the taxpayer exercised ordinary business care and prudence and was nevertheless unable to file

the return within the prescribed time, then the delay is due to a reasonable cause.

If the addition to the tax for delinquency in filing the return has been added, the amount so added shall be collected in the same manner as the tax.

Article 351–1 and 351–8 of Treasury Regulations 94 are, as far as the issues of this case are concerned, identical with the same numbered articles in Regulations 86.

Supreme Court of the United States

October Term, 1942

No. 419

R. SIMPSON & CO., INC.,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE.

PETITION OF THE PETITIONER FOR REHEARING OF APPLICATION FOR WRIT OF CERTIORARI AND MOTION FOR LEAVE TO FILE OUT OF TIME, WITH MEMORANDUM OF LAW THEREON.

GERALD DONOVAN,
Counsel for Petitioner.

JAMES T. HEENEHAN,
FRANCIS F. STEVENS,
Of Counsel.

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No. 419

R. Simpson & Co., Inc.,

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Commissioner of Internal Revenue.

MOTION OF PETITIONER FOR LEAVE TO FILE, OUT OF TIME, PETITION FOR REHEARING.

To the Honorable Harlan Fiske Stone, Chief Justice, and the Associated Justices of the Supreme Court of the United States:

Comes now, R. Simpson & Co., Inc., the petitioner in the above-entitled cause, and moves, by its attorney, Gerald Donovan, that leave be granted to file out of time the attached petition for rehearing of its application for certiorari in the above-entitled cause, and, in support of its motion, makes the following brief statement to this Honorable Court of the object of said motion and the facts on which it is based.

1. That on or about November 9, 1942, this Honorable Court denied the petition for certiorari herein.

2. That on or about February 10, 1943, a conflict of decisions on the same matter developed (as described in the annexed petition for rehearing) between the decision of the United States Circuit Court of Appeals for the Ninth

Circuit and the decision, herein, of the United States Circuit Court of Appeals for the Second Circuit.

3. That on or about March 22, 1943, the opinion of the Ninth Circuit in said case was withdrawn and another opinion substituted therefor.

4. That the aforesaid substituted opinion of the Ninth Circuit did not resolve the aforesaid conflict of decisions but, on the contrary, re-emphasized it.

5. That the reason this petition for rehearing was not sooner presented to this Honorable Court is that the aforesaid conflicting decision of the Ninth Circuit has not been, as yet, officially reported and petitioner has just recently become informed of its existence.

WHEREFORE, upon the foregoing grounds, it is respectfully urged that this motion for leave to file, out of time, the annexed petition for rehearing, be granted and that a Writ of Certiorari be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Second Circuit, directing that court to certify and send to this Honorable Court for its review and determination, on a day certain, therein to be named, a full and complete transcript of the record and all proceedings in this case, numbered and entitled on its docket "No. 147, R. Simpson & Co. v. Commissioner of Internal Revenue."

Respectfully submitted,

(Sgd.) GERALD DONOVAN,
Counsel for Petitioner.

JAMES T. HEENEHAN,
FRANCIS F. STEVENS,
Of Counsel.

Supreme Court of the United States

October Term, 1942

No. 419

R. SIMPSON & CO., INC.,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE.

PETITION FOR REHEARING.

To the Honorable Harlan Fiske Stone, Chief Justice, and the Associated Justices of the Supreme Court of the United States:

COMES NOW, R. SIMPSON & CO., INC., the petitioner in the above-entitled cause, and presents by its attorney GERALD DONOVAN, its petition for a rehearing of its application for a writ of certiorari in the above-entitled cause, and, in support thereof, respectfully shows to this Honorable Court:

1. That on or about September 25, 1942, your petitioner filed its petition, in the above-entitled cause for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit, together with its brief in support of said petition and the transcript of record.

2. That the principal contentions presented by said petition for certiorari were as follows:

(a) That the United States Circuit Court for the Second Circuit erred in holding herein that during the taxable

years in controversy (1934, 1935 and 1936) the petitioner, a corporation found herein by the United States Board of Tax Appeals to have been "actively engaged in the conduct of business with the general public in the operation of its pawnshops" (R. 27), and not found by the Board to have held the securities of, or otherwise to have controlled, any other corporation, person or organization, was a holding company within the meaning of Section 351 of the Revenue Acts of 1934 and 1936, respectively, or either of said acts.

(b) That said Circuit Court erred in holding that the application to petitioner of the aforesaid two statutes, or either of them, is not unconstitutional under the organic law of the United States of America.

(c) That said Circuit Court erred in holding that said statutes, or either of them, as applied to petitioner are not unconstitutional under the organic law of the United States of America.

(d) That said Circuit Court erred in holding that the filing by petitioner of its "complete income and excess profit tax returns, Form 1120, for the taxable years" (R. 27), the filing by petitioner of "information returns, Form 1096, with the attached Form 1099 listing the amounts of dividends over $300. paid to its stockholders, for the years in question" (R. 27) and the further fact that "petitioner's books and records, which gave some indication that more than 50 per cent of its stock was owned by less than five stockholders and disclosed that at least 80 per cent of its income was derived from interest, were at all times available to respondent and were actually made available to respondent's agents during audit of the income tax returns for the taxable years" (R. 27, 28), did not constitute in substance and effect the filing of Form 1120-H (personal holding company return) or the equivalent thereof, or did not,

at the very least, relieve petitioner from the imposition of penalties for failure to file said Form 1120-H.

3. That on or about November 9, 1942, this Honorable Court denied the aforesaid petition for a writ of certiorari.

4. That on or about February 10, 1943, a conflict of decisions on the same matter developed between United States circuit courts of appeals through the unanimous decision of the United States Circuit Court of Appeals for the Ninth Circuit in the case of *Lane-Wells Company* v. *Commissioner of Internal Revenue* (not yet officially reported) holding under substantially similar facts to those herein that (contrary to the decision of the Second Circuit, herein, as stated above) no penalties should be imposed for failure to file such Form 1120-H.

5. That on or about March 22, 1943, the opinion of the Ninth Circuit in said *Lane-Wells Co.* case was withdrawn and another opinion (denying the petition for rehearing of Commissioner of Internal Revenue) substituted therefor.

6. That the aforesaid substituted opinion of the Ninth Circuit did not modify, alter, or revoke said court's conclusion that penalties should not be imposed for failure to file Form 1120-H but, on the contrary, unanimously reaffirmed, after painstaking reconsideration, said court's original, unanimous decision to that effect.

7. That the reason this petition for rehearing was not sooner presented to this Honorable Court is that the aforesaid conflicting decision of the Ninth Circuit has not been, as yet, officially reported and petitioner has just recently become informed of its existence.

WHEREFORE, upon the foregoing grounds, it is respectfully urged that this petition for a rehearing be granted, that a Writ of Certiorari be issued out of and under the seal

of this Honorable Court directed to the United States Circuit Court of Appeals for the Second Circuit, directing that court to certify and send to this Honorable Court for its review and determination, on a day certain therein to be named, a full and complete transcript of the record and all proceedings in this case, numbered and entitled on its docket "No. 147, R. Simpson & Co. v. Commissioner of Internal Revenue"; that said judgment of the United States Circuit Court of Appeals for the Second Circuit or, at the very least, that portion thereof which imposes a tax penalty, be reversed; and that this petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

May 28, 1943.

Respectfully submitted,

(Sgd.) GERALD DONOVAN,
Counsel for Petitioner.

JAMES T. HEENEHAN,
FRANCIS F. STEVENS,
Of Counsel.

Certificate of Counsel.

I, counsel for the above-named R. SIMP s & Co. INC., petitioner and movant, do hereby certify that both the foregoing petition for rehearing of petitioner's application for a writ of certiorari herein and the foregoing motion for leave to file, out of time, said petition for rehearing are presented in good faith, not for delay, and in the judgment of counsel, are well founded in law and fact.

(Sgd.) GERALD DONOVAN,
Counsel for R. Simpson & Co. Inc.,
Petitioner and Movant.

Supreme Court of the United States

October Term, 1942

No. 419

R. SIMPSON & CO., INC.,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE.

MEMORANDUM OF LAW.

The Case of *Lane-Wells Co.* v. *Commissioner* (C. C. A. 9).

In the case of *Lane-Wells Company* v. *Commissioner of Internal Revenue* (C. C. A. 9 not yet officially reported. Earlier opinion of February 10, 1943 withdrawn and opinion of March 23, 1943 denying Commissioner rehearing substituted therefor) the taxpayer filed a timely income tax return (Form 1120) for the taxable years but failed to file the special return form (Form 1120H) required by regulation to be filed by personal holding companies. Because of such failure to file Form 1120H, the Government contended that deficiencies and penalties could be determined without reference to any limitation period.

The United States Circuit Court of Appeals for the Ninth Circuit, reversing a decision of the United States Board of Tax Appeals (43 B. T. A. 463; 45 B. T. A. 175), concluded that the return on Form 1120 revealed the neces-

sary facts upon which the Commissioner could have asserted the personal holding company tax and consequently such return started the running of the time within which the tax could be assessed, DENMAN, Circuit Judge, writing for a unanimous Court, saying in part:

> "The petitioning corporations seek a review of a decision of the United States Board of Tax Appeals, now Tax Court of the United States, sustaining respondent's ((Commissioner of Internal Revenue)) determination of deficiencies and penalties on income surtax for the tax years 1934, 1935 and 1936 under the personal holding company income tax provisions of the Revenue Acts of 1934 and 1936.
>
> A. The validity of the returns as affecting the time limiting statutes and penalties. The Board found that Technicraft, in good faith, claimed in its returns that it was not a personal holding company. It found further that the returns, filed in due time, showed all the facts necessary for the respondent to compute the taxes as a personal holding company obligation.
>
> However, the incomes were returned on Form 1120 for taxing corporations not holding companies, instead of Form 1120H for taxing holding company corporations. The Commissioner also determined penalties of 25 percent. for each year on the theory that Technicraft had failed to file any returns and the penalties were upheld by the Board.
>
> We do not agree that the returns are to be deemed not made.
>
> . . . . . .
>
> We are unable to see any difference in principle between the Germantown decision ((309 U. S. 304, 307, 310, Feb. 26, 1940)) and the instant case, where one of the class of income taxpayers called 'holding companies' files, in good faith, a return on a form provided for companies not holding companies which

discloses the facts necessary to compute the tax due from the holding company.

* * * * * * * * * *

Since, under the Germantown decision, the good faith return of all facts necessary to compute a tax is a 'return', though on a return for a different taxpayer, the Board erred in upholding the penalties determined by the Commissioner under Sec. 291 for the tax years 1934, 1935 and 1936."

The Court thus concludes that the return on Form 1120 revealed the necessary facts upon which the Commissioner could have asserted the personal holding company tax and consequently that the assertion of penalties for failure to file Form 1120H was in error.

Similarity of Cause at Bar to *Lane-Wells* Case.

In the case at bar as in the *Lane-Wells Co.* case, discussed immediately *supra*, the petitioning corporation ((R. Simpson & Co. Inc)) sought a review by a United States Circuit Court of Appeals ((Second Circuit)) of a decision of the United States Board of Tax Appeals, now Tax Court of the United States, sustaining respondent's ((Commissioner of Internal Revenue)) determination of deficiencies and *penalties* on income surtax for the tax years 1934, 1935 and 1936 under the personal holding company income tax provisions of the Revenue Acts of 1934 and 1936 (Record, pp. 33-42).

In the cause at bar, as in the *Lane-Wells Co.* case, the Board of Tax Appeals found that petitioner's claim, in its Form 1120 returns, that it was not a personal holding company, was made in good faith:

"He did not file personal holding company returns on behalf of petitioner for the taxable years

because he thought petitioner was not a personal holding company within the meaning of Section 351" (Record, p. 28).

"* * * petitioner's failure to file was due entirely to its erroneous impression that it was not one. This * * * requires approval of respondent's imposition of the penalty, *Lanes-Wells Co.*, 43 B. T. A. 463 * * *" (Record, p. 30).

(It is thus also apparent that the Board in the cause at bar relied on its prior decision in the *Lane-Wells* case, now reversed by the United States Circuit Court of Appeals for the Ninth Circuit.)

Likewise, as in the Circuit Court *Lane-Wells* case, the Board found that the returns filed in due time, showed all the facts necessary for the respondent Commissioner to compute the taxes as a personal holding company obligation:

"On or before the due dates petitioner filed its complete income and excess profits tax returns, Form 1120, for the taxable years. * * * Petitioner also filed information returns, Form 1096, with the attached Form 1099 listing the amounts of dividends over $300 paid to its stockholders, for the years in question. Petitioner's books and records, which gave some indication that more than 50 per cent of its stock was owned by less than five stockholders and disclosed that at least 80 per cent of its income was derived from interest, were at all times available to respondent and were actually made available to respondent's agents during audit of the income tax returns for the taxable years" (Record, pp. 27-28).

As in the *Lane-Wells* case, the incomes, in the cause at bar, were returned on Form 1120 instead of Form 1120H and the Commissioner also determined penalties of 25 per cent for each year on the theory that the petitioner had

failed to file any returns, and the penalties were upheld by the Board:

> "Respondent * * * added 25 per cent penalties for failure to file personal holding company returns" (Record, p. 25).
>
> "Petitioner did not file personal holding company returns, Form 1120-H, for the taxable years" (Record, p. 28).
>
> "The penalty for failing to file a personal holding company return is mandatory for the years 1934 and 1935, since no return was ever filed. * * * This requires approval of respondent's imposition of the penalty, *Lane-Wells Co.*, 43 B. T. A. 463, without the necessity of passing upon petitioner's contention that under the wording of the 1936 Act a showing of reasonable cause entitled the taxpayer to a remission of the imposition in spite of the complete absence of even a delinquent filing" (Record, p. 30).

It thus clearly appears that a conflict of decisions exists between two circuit courts of appeals, and it is respectfully submitted that the petition for rehearing herein should be granted and a writ of certiorari issued.

Respectfully submitted,

GERALD DONOVAN
Counsel for Petitioner.

JAMES T. HEENEHAN,
FRANCIS F. STEVENS,
Of Counsel.

Supreme Court of the United States

October Term—1943

No. 1

R. Simpson & Co. Inc.,

Petitioner,

vs.

Commissioner of Internal Revenue.

PETITION BY THE PETITIONER HEREIN FOR REHEARING INCLUDING VACATION OF ORDER DISMISSING WRIT OF CERTIORARI HEREIN AND GRANTING OF ORDER REINSTATING SAID WRIT AND REOPENING THE APPEAL.

Gerald Donovan,
Counsel for Petitioner.

Francis F. Stevens,
Of Counsel.

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October Term—1943

R. Simpson & Co. Inc.,

Petitioner,

vs.

Commissioner of Internal Revenue.

PETITION FOR REHEARING, INCLUDING VACATION OF ORDER AND GRANTING ORDER OF REINSTATEMENT AND REOPENING.

To the Honorable Harlan Fiske Stone, Chief Justice, and the Associate Justices, of the Supreme Court of the United States:

Comes now, R. Simpson & Co., Inc., the petitioner in the above-entitled cause, and presents, by its attorney, Gerald Donovan, its petition for rehearing (including vacation of the order dismissing the writ of certiorari herein, and granting of order reinstating said writ) and, in support thereof, respectfully shows to this Honorable Court:

1. That on or about September 25, 1942, your petitioner filed its petition, in the above-entitled cause for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit, together with its brief in support of said petition and the transcript of record.

2. That the principal contentions presented by said petition for certiorari were as follows:

(a) That the United States Circuit Court for the Second Circuit erred in holding herein that during the taxable

years in controversy (1934, 1935 and 1936) the petitioner, a corporation found herein by the United States Board of Tax Appeals to have been "actively engaged in the conduct of business with the general public in the operation of its pawnshops" (R. 27), and not found by the Board to have held the securities of, or otherwise to have controlled, any other corporation, person or organization, was a holding company within the meaning of Section 351 of the Revenue Acts of 1934 and 1936, respectively, or either of said acts.

(b) That said Circuit Court erred in holding that the application to petitioner of the aforesaid two statutes, or either of them, is not unconstitutional under the organic law of the United States of America.

(c) That said Circuit Court erred in holding that said statutes, or either of them, as applied to petitioner are not unconstitutional under the organic law of the United States of America.

(d) That said Circuit Court erred in holding that the filing by petitioner of its "complete income and excess-profit tax returns, Form 1120, for the taxable years" (R. 27), the filing by petitioner of "information returns, Form 1096, with the attached Form 1099 listing the amounts of dividends over $300. paid to its stockholders, for the years in question" (R. 27) and the further fact that "petitioner's books and records, which gave some indication that more than 50 per cent of its stock was owned by less than five stockholders and disclosed that at least 80 per cent of its income was derived from interest, were at all times available to respondent and were actually made available to respondent's agents during audit of the income tax returns for the taxable years" (R. 27, 28), did not constitute in substance and effect the filing of Form 1120-H (personal holding company return) or the equivalent thereof, or did not,

at the very least, relieve petitioner from the imposition of penalties for failure to file said Form 1120-H.

3. That on or about November 9, 1942, this Honorable Court denied the aforesaid petition for a writ of certiorari.

4. That on or about February 10, 1943, a conflict of decisions on the same matter developed between United States circuit courts of appeals through the unanimous decision of the United States Circuit Court of Appeals for the Ninth Circuit in the case of *Lane-Wells Company* v. *Commissioner of Internal Revenue* (not yet officially reported) holding under substantially similar facts to those herein that (contrary to the decision of the Second Circuit, herein, as stated above) no penalties should be imposed for failure to file such Form 1120-H.

5. That on or about March 22, 1943, the opinion of the Ninth Circuit in said *Lane-Wells Co.* case was withdrawn and another opinion (denying the petition for rehearing of Commissioner of Internal Revenue) substituted therefor.

6. That the aforesaid substituted opinion of the Ninth Circuit did not modify, alter, or revoke said court's conclusion that penalties should not be imposed for failure to file Form 1120-H, but, on the contrary, unanimously reaffirmed, after painstaking reconsideration, said court's original, unanimous decision to that effect.

7. That the reason the petition for rehearing of the application for certiorari was not sooner presented to this Honorable Court is that the aforesaid conflicting decision of the Ninth Circuit had not been, at that time, officially reported and petitioner had just recently become informed of its existence.

8. That on June 7, 1943 a motion for rehearing was granted by this Honorable Court and the prior order deny-

ing certiorari vacated. Certiorari was limited, however, to the second question involved (see paragraph "3" immediately *supra*)—*i. e.* the asserted penalty liability of the petitioner for failure to file Form 1120-H (personal holding company return).

9. That on January 12, 1944 the cause was argued before this Honorable Court.

10. That on February 14, 1944 the Court dismissed the writ of certiorari herein for want of jurisdiction, promulgating at the same time its majority opinion in support thereof. That, at the same time a dissenting opinion, concurred in by three of the Justices of the Court, was promulgated.

11. That, it is respectfully submitted, said dismissal of the writ of certiorari herein was erroneous, as shown by errors of fact and of law apparent on the face of the aforesaid majority opinion herein.

12. That among the errors of fact apparent on the face of said opinion are the following:

(a) *Page 4*—"The Government after consideration of the practical aspects of the question advises that in its view our practice in these matters has been 'salutary and in accordance with sound policy'" in so far as that (incomplete) quotation is used to sustain the contention that the Department of Justice's brief supports denial of certiorari within the term but beyond the 25 day period presently provided for in Rule 33 of this Honorable Court.

(b) *Page 1*—"The Commissioner *assessed* personal holding company surtaxes * * * and assessed a 25 per cent penalty"—

Although it is true that the Government's brief states a situation where the Commissioner deemed assessment necessary prior to judicial hearing of the controversy, the Record (8-16, 28-30, 31) belies it (as was pointed out to this Honorable Court at pages 1-2 of our Reply Brief).

(c) *Page 1* — "The *treasurer* who executed the income tax returns". — Although it is true that the Government's brief states to the Court that the treasurer executed the income tax returns, the Record (28) belies this also (as was brought to the attention of this Honorable Court at page 1 of our Reply Brief) for it was not the chief financial and accounting officer of the corporation who filed the returns but the chief executive officer—the president.

13. That among the errors of *law* apparent on the face of said opinion are the following:

Page 4 — "But when under our *rules* ((meaning after 25 days)) our denial has become final, the *statute* deprives us of jurisdiction over the case"—This seems an inadvertence (although an important one) for, of course, the power of the Court over its orders extends throughout the Term regardless of the number of days specified by the current *rule* for receiving applications for rehearing *without permission*. The authority to grant petitions for rehearing *during the Term* rises from the same source.

WHEREFORE, upon the foregoing grounds, it is respectfully urged that this petition for a rehearing be granted at such time as may be convenient to be fixed by the Court and that

(a) the order herein dismissing the writ of certiorari herein be vacated;

(b) that an order be granted reinstating said writ and reopening the appeal;

(c) that that portion of the judgment herein of the United States Circuit Court of Appeals for the Second Circuit which imposes a tax penalty be reversed (or at the very least that the penalty for the taxable year 1936 be removed or the cause remanded to the Tax Court for the purpose of reconsidering the imposition of the 25 per cent penalty for the year 1936, if the petitioner shall seasonably apply to the Tax Court therefor); and

(d) for such other and further relief as the nature of the case may require and to this Honorable Court shall seem proper.

March 8, 1944.

Respectfully submitted,

(Sgd.) GERALD DONOVAN,
Counsel for Petitioner.

FRANCIS F. STEVENS,
Of Counsel.

CERTIFICATE OF COUNSEL.

I, counsel for the above-named R. SIMPSON & Co. INC., petitioner and movant, do hereby certify that the foregoing petition for rehearing is presented in good faith, not for delay, and in the judgment of counsel is well founded in law and fact.

(Sgd.) GERALD DONOVAN,
Counsel for R. Simpson & Co. Inc.
Petitioner and Movant.

Supreme Court of the United States

October Term—1943

No. 1

R. Simpson & Co. Inc.,

Petitioner,

vs.

Commissioner of Internal Revenue.

MEMORANDUM OF LAW.

As was set forth in the Petition for Rehearing *supra*, it is respectfully submitted that the dismissal of the writ of certiorari herein was erroneous, as shown by errors of fact and of law apparent on the face of the majority opinion in support of said dismissal.

Errors of Fact.

We shall not burden the Court by repeating here the full quotation of the errors of fact in the majority opinion but respectfully refer the Court to the Petition for Rehearing *supra*. Suffice it to say that the situation involved herein was not, as the Government brief states, of the type where the Commissioner made or attempted to make a jeopardy or other assessment prior to judicial hearing of the controversy (R. 8-16, 28-30, 31).

Furthermore the chief financial and *accounting* officer of the corporation did not, as the majority opinion states, execute the income tax returns; that was done by the chief executive officer—the president.

Also Department of Justice's brief herein does not, as the majority opinion herein states, advise that the practice of denying in tax cases, rehearing beyond the *25 day* period would be salutary and in accordance with sound policy but, on the contrary, maintains that the previous practice of this Court in reconsidering *within the term*, denials of certiorari "in Section 1140 cases, as well as in other cases, is salutary and in accordance with sound policy" (Govt. Brief 27). See also pages 7, 14, 15, 16, 17, 20, 21, 23, 24, 26. ("Section 1145 does mitigate any hazard to the revenues consequent upon the delay of a few *months*"; 27 (footnote) and 28.)

Errors of Law.

As pointed out in the Petition for Rehearing, *supra*, if, as the prevailing opinion concedes, the Court has jurisdiction to grant petitions for rehearing within the 25 day period currently provided (by its Rule 33), it must also have jurisdiction during the entire Term; for its authority to grant petitions for rehearing during the Term arises from the *same* source. This can, perhaps, be more clearly seen if, for instance, the Court, (having, of course, power to modify its own rules) were to change the current period of 25 days (it has been a different period at times in the past), for appl. ations, without permission, for rehearing, to the period of the entire Term. Would the Court in that event be hoisting itself (so far as jurisdiction is concerned) by its own bootstraps. We respectfully submit that the answer is obviously not—the Court has jurisdiction throughout the *entire* Term.

Remand to the Tax Court.

As was prayed for, in the Petition for Rehearing, *supra*, it is hoped that the Court will, at the very least, remand the

cause to the Tax Court for the purpose of reconsidering the imposition of the 25 per cent penalty for the year 1936, if the petitioner shall seasonably apply to the Tax Court therefor. For, as in the case of *Commissioner* v. *Lane-Wells Company* (decided on the same day as the cause at bar) the Board of Tax Appeals erroneously assumed that the mandatory provision for penalty applied to the taxable year 1936 as well as the other taxable years involved herein. We respectfully submit that, as in that cause, this Honorable Court should, if it does not care to make the determination itself, remand the present case to the Tax Court for the purpose of considering the imposition of the 25 per cent penalty for the year 1936.

Conclusion.

WHEREFORE, UPON THE FOREGOING GROUNDS, IT IS RESPECTFULLY SUBMITTED THAT THIS PETITION FOR REHEARING SHOULD BE GRANTED AT SUCH TIME AS MAY BE CONVENIENT TO BE FIXED BY THE COURT AND THAT

(a) the order herein dismissing the writ of certiorari herein be vacated;

(b) that an order be granted reinstating said writ and reopening the appeal;

(c) that that portion of the judgment herein of the United States Circuit Court of Appeals for the Second Circuit which imposes a tax penalty be reversed (or at the very least that the penalty for the taxable year 1936 be removed or the cause remanded to the Tax Court for the purpose of reconsidering the imposition of the 25 per cent penalty for the year 1936, if the petitioner shall seasonably apply to the Tax Court therefor); and

(d) for such other and further relief as the nature of the case may require and to this Honorable Court shall seem proper.

Respectfully submitted,

(Sgd.) GERALD DONOVAN,
Counsel for Petitioner.

FRANCIS F. STEVENS,
Of Counsel.

SUPREME COURT OF THE UNITED STATES.

No. 1.—October Term, 1943.

R. Simpson & Co., Inc., Petitioner, *vs.* Commissioner of Internal Revenue. | On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[February 14, 1944.]

Mr. Justice Jackson delivered the opinion of the Court.

For the years 1934, 1935, and 1936 the taxpayer, a corporation, filed complete income and excess-profits tax returns on Form 1120 of the Treasury Department. Each of these included a question whether the corporation was a personal holding company within the meaning of § 351 of the applicable revenue act and stated that if it was, an additional return on Form 1120H was required. The taxpayer answered the question in the negative and did not in any year file personal holding company returns on Form 1120H.

The Commissioner assessed personal holding company surtaxes for each year and under the authority of § 406 of the Revenue Act of 1935 and § 291 of the Revenue Acts of 1934 and 1936 assessed a 25 per cent penalty for failure to file the personal holding company return.

The treasurer, who executed the income tax returns, did not file personal holding company returns because he thought the taxpayer was not a personal holding company within the meaning of the Act. It was actively engaged in the pawnshop business. However, more than 50 per cent of its capital stock was owned by less than five stockholders, and more than 80 per cent of its gross income was derived from interest. The taxpayer filed information returns showing dividends of over $300 paid to each stockholder during those years and its books and records made available to the Commissioner during audit disclosed the facts. No fraud or bad faith is suggested.

The Board of Tax Appeals affirmed the penalties,[1] and its decision was affirmed by the Circuit Court of Appeals.[2] There

[1] 44 B. T. A. 498.
[2] 138 F. 2d 742.

appearing to be no conflict of decision between circuits, we on November 9, 1942 denied certiorari.[3] The 25-day period allowed by our rule in which to file petition for rehearing expired. In February 1943 a conflict developed through decision of *Lane-Wells Co.* v. *Commissioner* by the Court of Appeals for the Ninth Circuit.[4] Petitioner asked leave to file out of time a petition for rehearing and we consented. On June 7, 1943, we granted petition for rehearing, vacated the order denying certiorari, and granted certiorari limited to the penalty question.[5] We asked counsel in view of § 1140 of the Internal Revenue Code and *Helvering* v. *Northern Coal Co.*, 293 U. S. 191, to discuss our jurisdiction to grant a petition for rehearing in the case.

Section 1140 of the Internal Revenue Code, in relevant part, provides:

"The decision of the Tax Court shall become final—

. . . . . .

(b) *Decision affirmed or petition for review dismissed.*—

. . . . . .

(2) *Petition for certiorari denied.*—Upon denial of a petition for certiorari, if the decision of the Tax Court has been affirmed or the petition for review dismissed by the Circuit Court of Appeals; or

(3) *After mandate of the Supreme Court.*—Upon the expiration of 30 days from the date of issuance of the mandate of the Supreme Court, if such Court directs that the decision of the Board be affirmed or the petition for review dismissed."

There are other provisions dealing with the situations where the Board's decision is modified or reversed by the Circuit Court of Appeals or by this Court, the purpose being to determine definitely the date on which the statute of limitations, suspended during appeal, begins to run again and assessment may be made by the Commissioner. The Revenue Act of 1926 had identical provisions.[6] In reporting upon the provision in the Revenue Bill of 1926, the Senate committee said:

"Section 1005 prescribes the date on which a decision of the Board (whether or not review thereof is had) is to become final. Inasmuch as the statute of limitations upon assessments and suits for collection, both of which are suspended during review of the Com-

[3] 317 U. S. 677.

[4] 134 F. 2d 977.

[5] 319 U. S. 778.

[6] § 1005, 44 Stat. 110.

missioner's determination, commences to run upon the day upon which the Board's decision becomes final, it is of utmost importance that this time be specified as accurately as possible. In some instances in order to achieve this result the usual rules of law applicable in court procedure must be changed. For example, the power of the court of review to recall its mandate is made to expire 30 days from the date of issuance of the mandate." Sen. Rep. No. 52, 69th Cong., 1st Sess., p. 37.

In *Helvering* v. *Northern Coal Co.*, *supra*, we considered the provision of the 1926 Act, corresponding to § 1140(b), (3), of the Internal Revenue Code, dealing with issuance of mandate by this Court. The question was whether notwithstanding the lapse of more than thirty days after mandate we could grant a petition for rehearing, and it was urged that this statute did not qualify the inherent power of the Court to reconsider its judgments throughout the term in which they are entered. Quoting the statute, we held: "In view of the authoritative and explicit requirement of the statute and of its application to these cases, the petitions for rehearing are severally denied."

While it appears that we have a number of times granted certiorari to review decisions in cases originating with the Tax Court after once denying the petitions, *Duquesne Steel Foundry Co.* v. *Burnet*, certiorari denied, 282 U. S. 878, certiorari granted, 282 U. S. 830; *Neuberger* v. *Commissioner*, certiorari denied, 308 U. S. 623, certiorari granted, 310 U. S. 655; *Crane-Johnson Co.* v. *Commissioner*, certiorari denied, 308 U. S. 627, certiorari granted, 309 U. S. 692; *Helvering* v. *Cement Investors, Inc.*, certiorari denied, 315 U. S. 802, certiorari granted, 315 U. S. 825, in all but one of these cases the petition for rehearing was filed within 25 days after the denial of certiorari. In the other, the question of jurisdiction was not raised or considered, and therefore it does not establish a construction of the statute. *United States* v. *More*, 3 Cranch 159, 172; *Snow* v. *United States*, 118 U. S. 346, 354; *Cross* v. *Burke*, 146 U. S. 82, 86; *Louisville Trust Co.* v. *Knott*, 191 U. S. 225, 236; *Arant* v. *Lane*, 245 U. S. 166, 170.

It sometimes is desirable in the light of events to grant a previously denied writ of certiorari, as where it appears the question must later be taken because of conflict. A grant in such a case not only enables us to do justice to the party if it appears that he has the right of the controversy, but also it gives us the benefit of argument and examination of the additional or contrary aspects

of the question presented by the case. Our rules provide for petitions for rehearing as matter of right within 25 days after judgment,[7] and this rule has been applied to petitions for rehearings of orders denying certiorari. We have applied it to cases falling within the purview of Section 1140(b)(2). No mandate issues on denial of certiorari, and after a final decision the mandate does not issue until expiration of the 25-day period within which petition for rehearing may be filed.[8] If, therefore, we follow the practice heretofore observed, by which we regard denials of certiorari as qualified until the 25-day period expires, we put the denial and the decision on a generally equal basis except as Congress has seen fit to give the latter an additional thirty days before finality. The Government after consideration of the practical aspects of the question advises that in its view our practice in these matters has been "salutary and in accordance with sound policy." There appears to be no good reason, therefore, to hold that the rule as to rehearings, in so far as it permits as matter of right the filing of petition therefor within 25 days, may not apply to this class of cases. But when under our rules our denial has become final, this statute deprives us of jurisdiction over the case.

Accordingly the writ of certiorari is dismissed for want of jurisdiction.

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7 Rule 33.
8 Rule 34.

Mr. Justice DOUGLAS, with whom Mr. Justice MURPHY and Mr. Justice RUTLEDGE concur, dissenting.

I can find no warrant in § 1140 of the Internal Revenue Code for saying that the decision of the Tax Court becomes "final" only after the expiration of the 25-day period within which a petition for rehearing may be filed. The section contains no such provision. The 25-day period for rehearings is prescribed by our Rule 33. But our authority to grant petitions for rehearing during the Term rises from the same source. See *Wayne United Gas Co.* v. *Owens-Illinois Glass Co.*, 300 U. S. 131, 136-137; *Art Metal Construction Co.* v. *United States*, 289 U. S. 706; *Bronson* v. *Schulten*, 104 U. S. 410, 415. Hence I see no basis for saying that one, but not the other, qualifies that provision of § 1140 which states that the decision of the Tax Court becomes final "upon denial of a petition for certiorari".